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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the dismissal of a civil action on the pleadings, based on nothing more than the intervenor Government's bare assertion of the state secrets privilege, violated the petitioners' constitutional rights of access to the courts.

PARTIES TO THE PROCEEDINGS

The petitioners are the legal representatives of sailors killed and injured on board the U.S.S. STARK on May 17, 1987. Their names are as follows:

Lawrence M. Bareford (injured)
Mr. and Mrs. Roland Bolduc (Doran H. Bolduc, deceased)
Mr. and Mrs. Leonard Calkins (Jeffrey L. Calkins, deceased)
Mr. and Mrs. Robert A. Caouette (Mark Robert Caouette, deceased)
Mrs. Kathleen Ciletta (John A. Ciletta, Jr., deceased)
Mr. and Mrs. Robert DeAngelis (Christopher DeAngelis, deceased)
Mr. and Mrs. Rodney Erwin (Steven Thomas Erwin, deceased)
Mrs. Shirley Jean Farr
Kasandra Ann Farr, a minor
Mr. and Mrs. Wilson P. Farr (Jerry Boyd Farr, deceased)
Mrs. Ernestine Foster
Tyrone Foster, a minor
Vernon Foster, a minor
Leo Foster, Sr.
Mim Foster Gaines (Vernon Foster, deceased)
Karen Gangidine (Martin Supple, deceased)
Mr. and Mrs. Nathan Grissette, Jr. (Dexter D. Grissette, deceased)
Mrs. Frances Homicki
Laura T. Homicki (Daniel Homicki, deceased)
Mr. and Mrs. Kenneth D. Janusik (Kenneth D. Janusik, deceased)
Mrs. Diane P. MacMullen
Deborah A. MacMullen, a minor

Lauren E. MacMullen, a minor (Thomas J. MacMullen, deceased)
Mr. and Mrs. Walter S. Phelps, III (Jeffrey Lee Phelps, deceased)
Mrs. Diana Lynn Pierce
Randi Lynn Pierce, a minor
Logan Mitchell Pierce, a minor
Mr. Donald W. Pierce (Randy E. Pierce, deceased)
Robert Quick
Karen Jean Welch (Kelly R. Quick, deceased)
Mrs. Carol A. Shippee
Patricia C. Shippee, a minor
Timothy M. Shippee, a minor
Brian R. Shippee, a minor (Robert L. Shippee, deceased)
Mr. and Mrs. Roger Stephens (Lee Stephens, deceased)
Mr. and Mrs. Bobby G. Stevens (James R. Stevens, deceased)
Mr. and Mrs. Alfred Ulmer (Vincent L. Ulmer, deceased)
Mrs. Lori E. Weaver
Patty J. Strong (Wayne R. Weaver, II, deceased)
James R. Wheeler (injured)
Mr. Joseph E. Wilson
Mrs. Mamie E. Wilson (Lloyd A. Wilson, deceased)

The respondents are private corporations:

General Dynamics Corporation
Hughes Aircraft Company
Unisys Corporation
General Electric Co. d/b/a RCA Corporation
RCA Government Systems Division
General Electric Aerospace
Advanced Technologies, Inc.

Rockwell International Corporation
FMC Corporation
Cardion Electronics, Inc.
Raytheon Company

At trial, the United States Government, through the Department of Justice, intervened in this case and is also a respondent in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Lawrence M. Bareford, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App., *infra*, 3a-15a) and the court's opinion on rehearing (App., *infra*, 1a-2a) are reported at 973 F.2d 1138 (5th Cir. 1992). The opinion of the United States District Court for the Southern District of Texas, Galveston Division, (App., *infra*, 16a-34a) and that court's final judgment (App., *infra*, 35a) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 16, 1992. A petition for rehearing was denied on October 14, 1992.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional right of access to the courts has been found in the right to petition clause, U.S. Const., amend. I, in the privileges and immunities clause, U.S. Const., art. IV, § 2, in the due process clause, U.S. Const., amend. V, and in the judicial power/diversity clause, U.S. Const., art. III, § 2.

The constitutional basis for the federal common law state secrets privilege has been found in the constitutional system of separation of powers and in the President's Article II duties as Commander in Chief and responsibilities for foreign affairs, U.S. Const., art. II, § 2.

The pertinent text of these constitutional provisions is reproduced in the Appendix at App., *infra*, 36a. No federal statutes are involved.[2]

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[1] The Fifth Circuit, on rehearing, separately remanded a gag order that had been imposed on the proceedings by the district court. That gag order has since been lifted.

[2] Specifically, this case does not involve classified information sought under the Freedom of Information Act,("FOIA") 5 U.S.C. § 552(b)(1), and, since it is not a criminal case, it does not involve the Classified Information Procedures Act, ("CIPA"), 18 U.S.C. App. §§ 1-16.

STATEMENT

This case presents the extreme example of the abdication of judicial control "to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). This dispute began as a wrongful death action by the families of deceased sailors (the "sailors") against the private defense contractors (the "contractors") whose defective equipment and calculated fraud caused the sailors' deaths. While the case was still on pleadings, and at a time before any discovery had been conducted, the Government, a nonparty, intervened and alleged that petitioners should not be allowed to proceed with this litigation. The Government sought dismissal of the sailors' suit based solely upon a conclusory affidavit by the Secretary of the Navy that this suit "would be expected to cause measurable damage to the national security of the United States." (R. 74).

Despite the over 2,500 pages of nonprivileged documents which the sailors filed in response to the Secretary's affidavit, the district court dismissed the sailors' lawsuit against the private contractors and refused to entertain any options short of outright dismissal. The Fifth Circuit held that the Secretary's affidavit alone, without further scrutiny, formed sufficient basis for dismissal of the sailors' civil action.

1. The Lawsuit.

On May 17, 1987, 37 sailors were killed and a host of others were injured when the U.S.S. STARK was hit by two Iraqi Exocet missiles. On April 26, 1990, the sailors filed suit against General Dynamics Corporation and a number of defense contractors, and alleged that the contractors' negligence, breach of warranty, product defects, fraud, misrepresentation, and deceptive trade practices led to the sailors' deaths and injuries.

2. The Government's Motion to Dismiss.

Shortly thereafter, and before any discovery had been sought, the Government intervened and moved to dismiss based on claims of the state secrets privilege.[3] The Government based its motion to dismiss entirely on the affidavit of then-Secretary of the Navy, Lawrence Garrett.[4] In that affidavit, Secretary Garrett stated that he had reviewed *with Government attorneys* "the types of information the plaintiffs would require in order to establish legally sufficient claims" and that *he* had determined that the disclosure of that information would "cause damage to the national security of the United States . . . ." Secretary Garrett then reviewed in broad terms, without reference to any specific documents, the "types of information" which are classified. Secretary Garrett then asserted the formal privilege over any information "which would indicate, *directly or indirectly*, the classified technical information concerning the weapons systems at issue" (emphasis added).

At the time the Government filed its motion to dismiss, and at all times thereafter, the sailors had not sued the United States and had not sought discovery of any classified information, either from the United States or from any party.

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[3] The Government also asserted a right to dismiss based upon the "espousal doctrine" and the political question doctrine. The district court rejected the espousal doctrine and the Government did not challenge that decision on appeal. The Fifth Circuit based its judgment entirely on the state secrets claim and expressly chose not to address the political question issue. App., *infra*, 14a.

[4] Secretary Garrett's affidavit is referenced in the Fifth Circuit opinion, App., *infra*, 7a-8a, and published as an appendix to the opinion of *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 548-53 (2d Cir. 1991).

3. The Sailors' Response.

As the sailors' response to the motion to dismiss made clear, the sailors intended to prove their case *without the use* of classified information. In response, the sailors presented over 2,500 pages of information, all of which is in the public domain. The Secretary never reviewed any of this information nor asserted a privilege over this information. App., *infra*, 7a. Also importantly, neither the Government nor the contractors controverted any of this information.

The sailors' nonprivileged production revealed that General Dynamics had fraudulently misrepresented the reliability of the Phalanx antimissile system, and that had the system worked as represented, the sailors would not have been killed. These facts were proved through detailed and uncontroverted affidavits and exhibits of two former General Dynamics' employees. Those affidavits swore that, with knowledge of the certain harm to our servicemen, General Dynamics created an "outlaw" software program which circumvented the Navy's reliability testing, and that General Dynamics, contrary to its representations to the Navy and others, knowingly manufactured a system that could not function.[5]

Also included in the sailors' documents was the affidavit of Captain Brindel, who was the commander of the U.S.S. STARK at the time of the incident. In that detailed and uncontroverted affidavit, Captain Brindel discussed the public record information concerning the rules of engagement and the details of the attack. Captain Brindel also discussed the capabilities of the defensive weapon systems. Captain Brindel swore: "I believe that STARK could have safely defended itself, and avoided the tragedy that occurred that

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[5] The Government has admitted, in contrast to the broad conclusions in the Secretary's affidavit, that these affidavits "do not contain classified information." (R.E. 43).

night, if the shipboard systems had performed to their represented capabilities."

The sailors also filed the affidavit of James H. Webb, Jr., who was the Secretary of the Navy at the time of the STARK incident. Mr. Webb acknowledged the public information about the system-wide problems with the Phalanx system, and the Navy's handling of the incident. Mr. Webb then stated: "Given the nature of the allegations in this case — that misrepresentation, failure to warn, and acts of fraud were committed as a matter of course by defense contractors — I believe it would benefit the national security of the United States to allow the case to go forward *under proper security restraints*" (emphasis added).

The sailors also filed documents which included the redacted Navy report of the incident, the lengthy, published congressional reports of the incident, congressional correspondence, and media reports about the incident and defects in the contractors' equipment.

4. The Dismissal.

Despite this wealth of nonprivileged evidence which proved the sailors' *prima facie* case without classified information, and despite the fact that the sailors had *never sought* classified information, the district court, without further scrutiny,[6] dismissed the sailors' lawsuit. The district court also refused to exercise any other judicial control, short

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[6] On the day before the hearing on the motion to dismiss, long after the deadline for responses had passed and without prior notice, the Government engaged in an *ex parte* conference with the district court, of which no record was made. The Fifth Circuit considered the due process violations in this *ex parte* proceeding "harmless" and whatever information may have been communicated by the Government to the district court formed no part of the Fifth Circuit's opinion. App., *infra*, 14a-15a.

of dismissal, in order to police disclosure of classified information. App., *infra*, 29a-30a.

5. The Fifth Circuit Opinion.

The Fifth Circuit affirmed the district court's dismissal based solely upon Secretary Garrett's affidavit, without further judicial scrutiny. With only that affidavit as a guide, the Fifth Circuit concluded: (1) that the sailors "have failed to demonstrate that [evidence that 'the Phalanx system was intended to destroy the Iraqi missile in these circumstances'] is available to them as unclassified information," App., *infra*, 9a; (2) that even if the sailors had made out a *prima facie* case, dismissal was yet required "because any further attempt by the plaintiffs to establish a *prima facie* case would threaten the disclosure of state secrets," App., *infra*, 10a; and (3) that "[n]o intermediate solution such as proposed by plaintiffs [short of dismissal] . . . can fully protect the United States' interest in keeping its state secrets undisclosed." App., *infra*, 14a. Thus, based upon the Secretary of the Navy's affidavit alone, in this case between private litigants, the Fifth Circuit denied the deceased sailors' families a right to their day in court.

REASONS FOR GRANTING THE PETITION

This case presents this Court with a significant opportunity to resolve a recurring issue of great national importance; that is, the constitutional and procedural boundaries which govern the assertion of the federal common law state secrets privilege by the executive. This Court has

not directly confronted this issue since its landmark decision in *United States v. Reynolds*, 345 U.S. 1 (1953).[7]

During these four decades of percolation, the handling of the state secrets privilege by federal courts in civil litigation has been chaotic, conflicting, and at times, as one jurist has said, "potentially frightening." *See Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 283 (4th Cir. 1980) (en banc) (per curiam) (Murnaghan, J., dissenting). As is shown by the collection of cases listed in the Appendix, federal courts have widely experimented in their attempts to satisfactorily resolve the competing constitutional interests. *See* App., *infra*, 37a-42a. Such experimentation has ranged from allowing litigation to proceed without privileged information (as was approved in *Reynolds*), to abatement of the suit until the national security threat no longer exists, to *in camera* trials, to appointment of a special master, to denial of a jury trial, to depositions before the judge in a secure facility, to item-by-item assertion of the privilege over specific documents, to provision of court reporters with security clearances — and, finally, as here, to the complete abandonment of judicial control by outright dismissal of the cause of action. *See* App., *infra*, 37a-42a.

Disturbingly, the assertion of the state secrets privilege by the Government, as reflected in reported cases, has become increasingly more common in recent years, particularly in suits between private parties.[8] And, equally

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[7] Although the state secrets privilege was mentioned in dicta in *United States v. Nixon*, the Court there was concerned with the parameters of the so-called executive privilege for presidential communications, the state secrets privilege not having been invoked. 418 U.S. 683, 710 (1974).

[8] The Appendix includes reported cases in which the Government invoked the federal common law state secrets privilege, and does not include cases which were decided under the classified information exception of the FOIA, criminal cases under CIPA, or CIA regulation cases. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990). Of

disturbing, the remedy of choice in such suits, particularly in suits between private parties, has become abandonment of judicial control by outright dismissal.[9] It is time for this Court to reconcile the conflicts in opinions among courts of appeals and district courts and to establish workable standards to guide federal courts in the future.

Moreover, a compelling need exists for this Court to resolve the constitutional issues left open in *Reynolds*. In *Reynolds*, the widows of three civilians, who were killed in the crash of an aircraft which was testing secret electronic equipment, sued the Government under the Federal Tort Claims Act. 345 U.S. at 3. Pursuant to a discovery request under Rule 34 of the Federal Rules of Civil Procedure, the widows sought production from the Government of the official accident investigation report. *Id.* The Government declined to produce the report, even after ordered to do so, and invoked the state secrets privilege. After the court imposed, as a discovery sanction, a finding of liability and entered judgment on damages, an appeal followed. *Id.* at 3-5.

On appeal, the Government asserted that it was entitled to withhold from judicial view any document that *it* deems to be in the public interest. *Id.* at 6. The respondents, on the other hand, asserted that the executive's power to withhold documents was waived by the Tort Claims Act. *Id.* In analysis of these "broad propositions," the Court said: "Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a

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the included cases, over half were reported in the last ten years, with the majority of suits between private parties (including this case) reported during the last two years. *See* App., *infra*, 37a-42a.

[9] In the last year, three reported cases between private parties (including this case) were entirely dismissed on the basis of the assertion by the Government, a nonparty, of the state secrets privilege. *See* App., *infra*, 41a-42a.

narrower ground for decision." *Id.* That "narrower ground" for decision was whether the Government had invoked a valid claim of privilege under Rule 34 of the Federal Rules of Civil Procedure. *Id.*

In the present case, in contrast, the "constitutional overtones" recognized but not addressed in *Reynolds* are unavoidable.[10] Here, unlike *Reynolds*, the sailors *never* sued the Government. And the sailors *never* sought production of any classified information from the Government. Thus, the validity of the claim of privilege under Rule 34 is not at issue.

Rather, what is directly at issue in this case is the stark collision between the constitutional need of the Government to protect state secrets and the constitutional right of the petitioners of access to the courts. In order to prevent constitutional abuses in the name of national security, this Court should finally resolve this issue and provide clear standards to guide the Executive Branch, courts, and litigants.

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[10] These constitutional issues were raised in the trial court in petitioners' response to the motion to dismiss (R. 116), at the hearing on the motion to dismiss (R.E. 56, 62), in the petitioners' motion for reconsideration, for new trial, or to alter or amend findings (R. 129), and in the petitioners' motion to reinstate (R. 152). The pertinent point of error brought in the court of appeals was: "Whether the district court's national security dismissal violated Appellants' constitutional rights to access to the courts, since Appellants had presented a *prima facie* case of negligence, breach of warranty, strict liability, fraud, misrepresentation, and deceptive trade practices." *See* Brief of Appellants.

1. Judicial Control Over the Evidence Cannot Be Abdicated to Executive Officers.

The sailors, both here and below, are fully mindful of the need to protect national security.[11] But our courts must be ever mindful of abuses committed in the name of national security. In fact, many of the most shameful episodes in our history were founded upon assertions of "national security." Stacy, *Espionage Prosecutions, the Right to Present a Defense, and the State Secrets Privilege*, 58 Univ. Colo. L. Rev. 177, 210 n.138 (1977). Such episodes include the Red Scare of the 1920s, the mass incarceration of Japanese-Americans during the 1940s, the McCarthyism of the 1950s, and the politically motivated break-ins and wiretaps of the 1970s. *Id.* As Justice Robert H. Jackson once wrote, "[s]ecurity is like liberty in that many are the crimes committed in its name." *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

This case vividly demonstrates how easily the rights of citizens can be abused by Government assertions of national security in the state secrets context. Here, the sailors filed their lawsuit against private defense contractors. The Government had not been called to the controversy and no party had yet sought any information, classified or otherwise, from the Government. Nonetheless, the Government intervened and sought to dismiss the case.

The Government relied for dismissal solely upon the bare assertion by the then-Secretary of the Navy of categories of classified information (no specific documents were ever mentioned) and the belief that the sailors' lawsuit would threaten disclosure of classified information and impair national security. *See Zuckerbraun v. General Dynamics*

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[11] The petitioners' lead counsel in the district court was Michael J. Maloney, who is a 20-year Naval Reserve Commander with three tours of duty in Vietnam. (R.E. 56).

Corp., 935 F.2d 544, 548-53 (2d Cir. 1991) (reproduction of Secretary Garrett's affidavit). This belief was arrived at *before* the facts upon which the sailors based their claims were known and *before* any discovery had been instituted. And, this belief was arrived at after a perhaps self-serving review with Government attorneys of the "types of information" the sailors would need to prove their case.

The Secretary of the Navy is not a judicial officer of the United States. The Secretary does not have the power under the Constitution to determine what the law is, or should be, in this case. *See Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Moreover, the Secretary presented no evidence to support his broad assertions and determinations. Rather, his claim was founded entirely upon his own classification and analysis.

Yet, the courts below accepted these bare assertions uncritically. The courts did not probe to test the merits of these assertions. The courts did not exercise any further judicial scrutiny over the Secretary's affidavit. Even in the face of the sailors' voluminous, detailed, and documented evidence — nonprivileged evidence which the Secretary had never seen or reviewed — the courts below required nothing further from the Government. The courts dismissed the sailors' lawsuit on the pleadings before any discovery had been conducted.

This uncritical acceptance of a conclusory affidavit by an executive officer as the sole basis for dismissal, without more, represents a relinquishment of the judicial province. If the precedent of this and other recent state secrets cases is allowed to go unchecked, the stage is set for widespread abuse. Here, the privilege was invoked to cover up the fraud of defense contractors. Tomorrow, the privilege may be invoked to cover up the wrongdoing of the executive itself.

Professor Wigmore, in his discussion of this subject, cautioned:

> A court which abdicates its inherent function of determining the facts upon which the admissibility depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege.

John H. Wigmore, 8 *Evidence in Trials at Common Law* § 2379, at 809-10 (1961).

Others have noted the problems of executive officers whose "official habit and leaning tend to sway him toward a minimizing of the interest of an individual," of executive officers whose administrative practices preclude actual personal consideration of evidence, and of the "persistent tendency" of executive officers to overclassify. *McCormick's Handbook of the Law of Evidence* 235 (E. Cleary ed. 1972); *U.S. Government Information Policies and Practices — The Pentagon Papers: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong. 1st Sess., pt. 3, at 791 (1971) (testimony of then-Assistant Attorney General William Rehnquist).

The executive cannot be allowed to determine, without further judicial scrutiny, whether or how a civil action between private litigants should proceed. The courts should not be permitted to share their judicial function with the executive. *See United States v. Nixon*, 418 U.S. 683, 704 (1974) ("The 'judicial power of the United States' . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power . . . .").

These very principles fueled the decision in *Reynolds*. There, the Court wrestled with the problem of how to

harmonize the two extremes between uncritical acceptance of the affidavit of an executive officer, as here, and "forcing a disclosure of the very thing the privilege is designed to protect." 345 U.S. at 8. The Court resolved this "real difficulty" by establishment of a "formula of compromise" through analogy to the privilege against self-incrimination. *Id.* at 8-9.

With the privilege of self-incrimination, the Court had also been forced to harmonize two extremes: "[t]oo much judicial scrutiny into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Id.* at 8. The latter extreme was represented by those who advocated, as here, "that the bare assertion by the witness must be taken as conclusive . . . ." *Id.*

The compromise struck with the privilege of self-incrimination requires a court to exercise independent judicial scrutiny of the evidence and circumstances, the question asked, and whether injurious disclosure might result. *Id.* at 9. The *Reynolds* court held that "some like formula of compromise" must be applied with the state secrets privilege. *Id.* at 9. As the Court held: "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10.

In view of the "dubious necessity" for the privileged documents in *Reynolds*, since the petitioners could prove their case with alternative discovery sources, the Court held that the affidavit of the Secretary of the Air Force was a "sufficient showing" to cut off further discovery. *Id.* at 11. The Court remanded the case for trial without the privileged information. *Id.* However, the Court said that in cases where there is a strong showing of necessity, "the claim of privilege should not be lightly accepted . . . ." *Id.*

As with most seminal cases, the principles espoused in *Reynolds* established the landscape and the terrain, but the

cultivation was left to the lower courts. Unfortunately, as is evident from the conflicting decisions in this area, the lower courts have not benefitted from the lack of supervision and the lack of concrete standards and procedures. Now, almost 40 years later, we have reached the nadir in the development of the law.

It is time for this Court to establish meaningful procedures to guide the lower courts in the application of the state secrets privilege. Such procedures have been established by Congress in criminal cases in the Classified Information Procedures Act, 18 U.S.C. App. §§ 1-16. However, no such uniformity has been achieved in the development of the federal common law state secrets evidentiary privilege in civil cases.

The lack of standards can be seen here. For example, a number of other courts of appeal have held that the effect of the state secrets privilege, as with other privileges, is to remove that evidence from the case, "as though a witness had died." *See, e.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (*see* other sources noted at 709 F.2d at 64 n.56). With the evidence thus removed, dismissal is required "only if the plaintiffs were *manifestly* unable to make out a *prima facie* case without the requested information." *Id.* at 65 (emphasis added).

However, in this case, the Fifth Circuit held that even if the court concluded that the sailors had made out a *prima facie* case, dismissal was still required because the case "threatened" disclosure of state secrets, even peripherally. *See* App., *infra*, 10a-13a. The logic of this holding is troubling, for it is difficult to conceive of any way that a plaintiff could ever prevail. Even if the plaintiff, as here, produced volumes of unprivileged evidence to establish a *prima facie* case, it would still not be enough. The plaintiff's strong *prima facie* case could not overcome unsubstantiated "threats" of the disclosure of privileged

information which the plaintiff (and the court) had never seen, which the plaintiff had never sought, and which the plaintiff did not intend to use.

This lack of uniformity and lack of standards for the application of the state secrets privilege needs to be corrected.

2. Outright Dismissal Violated Petitioners' Constitutional Rights of Access to the Courts.

In 1985, the Fourth Circuit held, in a state secrets dismissal of a suit between private parties, that "denial of a forum provided under the Constitution for the resolution of disputes, U.S. Const., art. III, § 2, is a drastic remedy that has rarely been invoked." *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985).

Indeed, *Fitzgerald* was the *first* case in American jurisprudence where, in a suit between private parties, the action was dismissed based upon the assertion by the Government of the federal common law state secrets evidentiary privilege. *See, e.g., Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) (remanded for trial without privileged information); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977) (affirmed trial to bench and appointment of a special master); *see* App., *infra*, 41a-42a.

However, armed with the precedent established in *Fitzgerald*, the Government has selectively chosen to use the privilege as an offensive weapon. Where in 1985, dismissal was "rarely invoked," the Government now seeks dismissal in every case in which state secrets may be implicated. Because of the uncertain standards that guide these determinations (and surely because of the complexity and delicacy of these cases), dismissals have become routine. Last year alone, in the reported cases, four separate actions (including this case) were dismissed based solely upon the

assertion of the state secrets evidentiary privilege. *See, e.g.*, *Bowles v. United States*, 947 F.2d 91 (4th Cir. 1991); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991); *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991); *see also Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989).

The "constitutional overtones," as *Reynolds* put it, of this problem cannot be overstated. On the one hand, the Government's need to protect state secrets has a constitutional basis. The exact basis is unclear, but this Court has suggested that the privilege is rooted in the separation of powers, *Reynolds*, 345 U.S. at 6 n.9, or derived from the President's Article II duties as Commander in Chief or responsibilities for foreign affairs, *United States v. Nixon*, 418 U.S. 683, 710 (1974). *See Halkin v. Helms*, 598 F.2d 1, 14 (1978) (Bazelton, J., dissenting).

On the other hand, the sailors have a constitutional right of access to the courts. This is a fundamental right derived from various constitutional sources. The right of access to the courts has been found in the petition clause of the First Amendment, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); in the privileges and immunities clause of Article IV, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907); in the due process clause of the Fifth Amendment, *Silver v. Cormier*, 529 F.2d 161, 163 (8th Cir. 1976); and in the "judicial power" clause of Article II, *Fitzgerald*, 776 F.2d at 1242. This Court has recognized the fundamental nature of this right. "The right to sue and defend in the court is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers*, 207 U.S. at 148.

When these constitutional rights conflict, it is the duty of federal courts to reconcile the conflict. The petitioners' constitutional rights of access to the courts should not be rendered nugatory by the bare assertion of an evidentiary

privilege. The Court should devise procedures short of dismissal, which will protect and honor both constitutional interests.

Such procedures have been satisfactorily employed in the past and were available here. In fact, a few years ago this Court recognized a detailed government contractor (or military contractor) defense, promulgated in part to meet separation of powers concerns. *See Boyle v. United Technologies, Inc.*, 487 U.S. 500 (1988). If this case is not reviewed, the delicate balance struck in *Boyle* will be rendered worthless. In every case that involves military equipment, the Government, at its whim, can intervene to dismiss, based upon the unsupported assertion of vague "threats" of disclosure of information inimical to "national security."

In addition to the government contractor defense, the courts below had a number of other options. *See, e.g.*, *Reynolds*, 345 U.S. at 11-12 (remand for trial without privileged information; *In re United States*, 872 F.2d 472 (D.C. Cir. 1989), *cert. dism'd sub nom. United States v. Albertson*, 493 U.S. 960 (1989) (district court can police interests with item-by-item determination and other controls); *Northrop Corp.*, 751 F.2d at 400-02 (remand for trial without privileged information); *Loral Corp.*, 558 F.2d at 1132-33 (affirmed denial of jury trial and appointment of special master); *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (remanded for trial *in camera*); *see also* Comment, *Keeping State Secrets From the Jury: New Options for Safeguarding State Secrets*, 47 Fordham L. Rev. 94, 109-13 (1978) (describing options short of dismissal for the protection of state secrets); Zagel, *The State Secrets Privilege*, 50 Minn. L. Rev. 875, 885-88 (1966) (describing procedures to protect secrets yet allow cases to go forward).

To protect their right to a forum, and to balance their mutual concern to protect national security, the sailors below moved the district court and the Fifth Circuit to apply any

number of these options short of dismissal. (R. 129). In open court, the sailors offered to waive their right to a jury trial, to dismiss all defendants save General Dynamics, to permit only attorneys before the court with proper clearance, and so forth. (R.E. 61). The sailors also sought a long-term abatement until the contractors' equipment became obsolete or the national security threat vanished. (R. 129). Both the district court, App., *infra*, 29a-30a, and the Fifth Circuit, App., *infra*, 14a, rejected *any* procedural options and abandoned judicial control by outright dismissal.

This refusal to apply, or even attempt, *any* options, even when the sailors had yet to request a single privileged document to prove their case against a private party, shows the essentially standardless treatment to which the petitioners' fundamental constitutional rights have been accorded. This result is "not in keeping with the basic constitutional tenets of this country" and "would undermine our country's historic commitment to the rule of law." *Spock v. United States*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (court rejects Government's attempt to foreclose, at the pleading stage, with the state secrets privilege, Dr. Spock's suit for illegal wiretap).

In sum, this issue has been allowed to percolate too long in the lower courts. This case represents an extraordinary example of the modern abuses of the state secrets evidentiary privilege and therefore provides an excellent vehicle by which the Court can check these abuses and restore a constitutional balance.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 91-2432

LAWRENCE M. BAREFORD,
Individually, et al.,
Plaintiffs-Appellants,

versus

GENERAL DYNAMICS CORPORATION, ET AL.,
Defendants-Appellees,
and

UNITED STATES OF AMERICA,
Intervenor-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

On Petition for Rehearing and Suggestion
for Rehearing En Banc

Filed October 14, 1992
(Opinion September 16, 1992, 5th Cir.
1992, --- F.2d ---)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

We vacate part V of our opinion in *Bareford v. General Dynamics Corp.*, --- F.2d --- (5th Cir. 1992), and substitute the following therefor:

Plaintiffs challenge on First Amendment grounds the district court order to the parties not to communicate any information about the litigation to anyone except essential legal staff. We are persuaded that the maintenance of this order is a matter that must be remanded to the district court to examine in the first instance in light of this Court's rulings.

In all other respects, the order of the district court, dismissing plaintiffs' claims, is AFFIRMED.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

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*Senior District Judge of the Western District of Louisiana, sitting by designation.

LAWRENCE M. BAREFORD, Individually, et al., Plaintiffs-Appellants,

v.

GENERAL DYNAMICS CORPORATION, et al., Defendants-Appellees, and United States of America, Intervenor-Appellee.

No. 91-2432

United States Court of Appeals,
Fifth Circuit.

Sept. 16, 1992.

Before HIGGINBOTHAM and DUHÉ, Circuit Judges and HUNTER.* District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge.

We must grapple with the federal government's invocation of the state secret doctrine to a manufacturing and design defect suit against the manufacturer of a military weapons system. We are persuaded that plaintiffs would be unable to prove their case without classified information and that the very subject matter of the trial is a state secret. We affirm the district court's dismissal.

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*Senior District Judge of the Western District of Louisiana, sitting by designation.

I.

In 1987, during the Iraqi-Iranian War, an Iraqi F-1 Mirage fighter fired two Exocet missiles at the U.S.S. Stark, an Oliver Hazard Perry class frigate stationed in the Persian Gulf. The attack killed 37 crewmen on the Stark, including 23 of the plaintiffs' decedents in this case.

The Navy's official investigation concluded that there were four principle causes of the missiles' successful penetration of the Stark's defenses: (1) the failure of the Stark's commander to recognize the threat posed by the F-1 Mirage fighter; (2) improper watch manning and standing; (3) lack of proper weapon readiness; and (4) failure of the Stark's commander to use radar to warn the fighter to desist its attack. The United States has espoused the sailors' and their families' claims for death and has received over $27 million from Iraq to compensate families for deaths of sailors which has been distributed to the families of the deceased crewmen.

Bareford and other plaintiffs filed this action against several defense contractors including General Dynamics asserting that the Phalanx weapons system was defectively manufactured and designed, that General Dynamics and other contractors fraudulently and deceptively concealed these defects, and that the sailors' deaths or injuries were proximately caused by these defects.

The government intervened and filed a 12(b)(6) motion to dismiss the complaint, on the grounds that (1) the plaintiffs' claims had been espoused by the U.S. government; (2) the case presented a non-justiciable political question; and (3) the subject of the lawsuit was a "state secret" that was privileged under the state secret doctrine. The contractors filed a similar motion.

In response to these motions, the plaintiffs filed voluminous pleadings and exhibits, including 2,500 pages of affidavits and other documents. A hearing was scheduled on February 14, 1991. One day before the hearing, the government informed the plaintiffs' counsel that it intended to make an *in camera* production before the district court judge. The documents included an affidavit by an admiral and the unabridged version of the Navy Department's official investigation of the Stark incident.

The district court granted the government's motion to dismiss. The district court found that the plaintiffs' action was barred under the state secret privilege, because the trial of the case would require disclosure of classified information sensitive to national security.

II.

The privilege for state secrets allows the government to withhold information from discovery when disclosure would be inimical to national security. *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528,97 L.Ed. 727 (1953). The privilege may be invoked by the head of a governmental department with responsibility over the matter in question, and the head of the department must give personal consideration to the matter in question. *United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S.Ct. 528, 531-32, 97 L.Ed. 727 (1953). A government department may intervene in litigation to which it is not a party and assert the privilege, thereby preventing either party in the litigation from obtaining sensitive government information in discovery.

The effect of the privilege is generally to exclude the privileged evidence from the case. *Ellsberg v. Mitchell*, 709

F.2d 51, 65 (D.C.Cir.1983),*cert. denied*,465 U.S. 1038, 104 S.Ct. 1316, 79 L.Ed.2d 712 (1984). The plaintiff's case then goes forward without the privileged information and would be dismissed only if the remaining information were insufficient to make out a prima facie case. *Halkin v. Helms*, 690 F.2d 977, 998-99 (D.C.Cir.1982). Some courts, however, have held that the privilege can lead to the dismissal of the plaintiffs' case in two other circumstances. First, if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant. *In re United States*, 872 F.2d 472, 476 (D.C.Cir.), *cert. denied sub nom. United States v. Albertson*, 493 U.S. 960, 110 S.Ct. 398, 107 L.Ed.2d 365 (1989); *Molerio v. Federal Bureau of Investigation*,749 F.2d 815, 825 (D.C.Cir.1984). Second, some courts have held that the court should dismiss if the "very subject matter of the plaintiff's action is a state secret," even if the plaintiff has produced non-privileged evidence sufficient to make out a prima facie case. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 274 (4th Cir.1980)(en banc). The reason for dismissal in these circumstances is that witnesses with knowledge of secret information may divulge that information during trial because the plaintiffs "would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing." *Farnsworth Cannon*, 635 F.2d at 281; *cf. Bowles v. United States*, 950 F.2d 154, 156 (4th Cir.1991) ("If the case cannot be tried without compromising sensitive foreign policy secrets, the case must be dismissed.").

A.

We turn first to the plaintiffs' ability to prove their case without revealing state secrets. Although originally styled as a motion to dismiss for failure to state a claim, we will treat the defendants' motion as a motion for summary judgment because both parties have produced and rely upon evidence outside the pleadings. Plaintiffs contend that they can survive summary judgment pointing to 2,500 pages of affidavits and documents, all assertedly in the public domain. These documents include an affidavit of the former captain of the U.S.S. Stark, two affidavits from former employees of General Dynamics, and information contained in Congressional reports and other published sources. The Secretary of the Navy asserts no privilege for this evidence.[1]

There is a preliminary question of whether the government has validly invoked the state secret doctrine. Bareford asserts that Secretary of the Navy H. Lawrence Garrett did not personally review the plaintiffs' documents as required by *Reynolds*, 345 U.S. at 7-8, 73 S.Ct. at 531-32. We disagree. The government does not target documents produced by the plaintiffs, but objects to the claim which by necessity would rely upon highly sensitive information. Secretary Garrett states in his affidavit that he personally considered the type of evidence necessary to this claim.[2] The Secretary's review was sufficient.

Plaintiffs have succeeded in producing considerable

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1. The government maintains that security considerations prevent the Navy Department from either confirming or denying whether the offered evidence is classified information.

2. A copy of Secretary Garrett's affidavit was published as an appendix to the opinion in *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 548-53 (2d Cir.1991).

evidence, and present a closer issue than *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir.1991). In *Zuckerbraun*, the claims were almost identical to the claims in this case to recover for the death of a sailor in the Stark incident. The defendants responded with an affidavit from the Navy Secretary identical to the affidavit in this case, stating that the design and operation of the Phalanx weapons system were highly classified and sensitive matters and that disclosure of such information in litigation would be "inimical to national security."

The Second Circuit affirmed the dismissal of Zuckerbraun's claim. Judge Winter, writing for the panel, noted that the plaintiffs' claims of manufacturing and design defects at a minimum required proof of what the Phalanx weapons system is supposed to do, whether it was used when the Stark was hit, and, if it was, whether the failure of the system to work was the result of the manufacturers' negligence. The panel noted that "[t]hese questions cannot be resolved or even put into dispute without access to data regarding the design, manufacture, performance, functional characteristics, and testing of these systems and the rules of engagement under which the Stark was operating." *Zuckerbraun*, 935 F.2d at 547. Because this data was subject to the privilege, the panel concluded that "there is no evidence available to the appellant to establish a prima facie case." *Zuckerbraun*, 935 F.2d at 548.

Plaintiffs distinguish *Zuckerbraun* on the basis that Zuckerbraun apparently did not offer any non-privileged information on which to build a case. As noted in *Zuckerbraun*, "appellant has not designated any sources of reliable evidence on the factual issues going to liability." *Zuckerbraun*, 935 F.2d at 548. By contrast, the plaintiffs point to their 2,500 pages of evidence - eleven Congressional reports, letters, media articles, and eight declarations - that

they contend establishes a prima facie case of liability.

Bareford has come forward with substantial evidence from which a judge or jury might find problems, or even wrongdoing, by General Dynamics in its production and testing of the Phalanx system. That alone will not establish a prima facie case. Its claim of manufacturing and design defects requires proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals. This question cannot be resolved without access to detailed data regarding "the design, manufacture, performance, functional characteristics, and testing of these systems." *Zuckerbraun*, 935 F.2d at 547. Such an analysis of the capabilities of an advanced Navy frigate's defensive systems is the type of judicial disclosure of state secrets the doctrine blocks.

Bareford has come forward with evidence of the intended operation of the Phalanx system, but it is fairly described as evidence of the system's general performance limits, not the necessary detailed analysis of the system's intended performance in the situation in which the Stark incident occurred. This is certainly more than "dockside rumor," *Zuckerbraun*, 935 F.2d at 548, but would nonetheless not prove that the Phalanx system was intended to destroy the Iraqi missile in these circumstances, much less to prove why it failed to do so. Plaintiffs have failed to demonstrate that this evidence is available to them as unclassified information. Accordingly, we conclude that dismissal was appropriate.

B.

Defendants also urge that dismissal was appropriate because the state secret privilege would deprive them of a valid defense. The contractors contend that "privileged state

secrets are essential to the defense to plaintiffs' claim," because "resort to classified information would be necessary even to cross-examine plaintiffs' witnesses on the most basic points of their testimony."

Most courts that have discussed the state secret privilege have adopted the position that, if privileged information would establish a valid defense, then the court ought to dismiss the plaintiffs' case. *Zuckerbraun*, 935 F.2d at 547; *In re United States*, 872 F.2d at 481; *Molerio v. F.B.I.*, 749 F.2d 815, 821 (D.C.Cir.1984); *Ellsberg v. Mitchell*, 709 F.2d 51,65 (D.C.Cir.1983). This circuit has not yet ruled on the effect of the state secret privilege on the availability of defenses and we decline to do so here where it is unnecessary to resolve the case before us.

C.

Even if we found that Bareford had made out a prima facie case with unprivileged information, we conclude that the state secret doctrine would nonetheless bar the plaintiffs' action because any further attempt by the plaintiffs to establish a prima facie case would threaten disclosure of important state secrets. *Farnsworth Cannon*, 635 F.2d *at 281; see also Bowles v. United States,* 950 F.2d 154, 156 (4th Cir. 1991) (holding case must be dismissed "where no amount of effort or care will safeguard the privileged information"). The state secret doctrine justifies dismissal when privileged material is central "to the very question upon which a decision must be rendered." *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985).

In *Fitzgerald*, for instance, the court affirmed the district court's dismissal, even though the plaintiff intended to produce only non-privileged information to support his

case. Fitzgerald was a former Navy contractor who had conducted experiments with dolphins in order to design torpedoes. Penthouse magazine published a story that, in part, alleged that Fitzgerald had distributed brochures describing the experiments to countries outside the United States and that these brochures contained classified information. The plaintiff brought a libel action against Penthouse, contending that the information in the brochures was not classified.

To prove falsity, the plaintiff intended to call an official from the Pentagon's Branch of Security Policy to testify that the information was not classified. The Navy, however, intervened to invoke the state secret privilege, stating that, although the official's testimony would ostensibly be about non-classified information, there was a considerable danger that classified information would leak during cross-examination. The district court dismissed the plaintiff's action, finding that "the very subject of this litigation is a state secret." 776 F.2d at 1243.

The *Fitzgerald* court referred at length to the Secretary of the Navy's affidavit in which the Secretary stated that, while some uses of the marine mammal program were not classified, others were highly classified. By calling experts to testify about non-classified uses, the court saw a danger that "state secrets could be compromised even without direct disclosure by a witness." *Fitzgerald*, 776 F.2d at 1243. For instance,

> if a witness is questions about facts A and B, the witness testifies that fact A is not a military secret, and the government objects to any answer regarding fact B, by implication one might assume that fact B is a military secret.

Id. at 1243 n. 10.

In *Farnsworth Cannon*, the plaintiffs alleged that a Navy Department employee, Grimes, had tortiously interfered with the plaintiffs' contractual relations with the Navy Department by cancelling the plaintiffs' contracts with the Department. The plaintiffs did not request discovery from the government and the subject of the litigation - the defendant's motivations in cancelling some Navy contracts - seemed remote from the content of the state secrets contained in the contracts themselves. Nevertheless, the en banc court vacated the original panel opinion and held that the case presented too great a risk of disclosure of state secrets to go to trial.

Fitzgerald and *Farnsworth Cannon* recognize the practical reality that in the course of litigation, classified and unclassified information cannot always be separated. In some cases, it is appropriate that the courts restrict the parties' access not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures. There is little question that the design and limitations of the Phalanx weapons system are matter "which reasonably could be seen as a threat to the military interests ... of the nation." *Halkin v. Helms*, 690 F.2d 977,990 (D.C.Cir.1982). As Judge Winters noted in *Zuckerbraun*, "the disclosure of secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation's warships may reasonably be viewed as inimical to national security." 935 F.2d at 547.

Plaintiffs would present the testimony of former Navy Captain Brindel, commanding officer on the Stark, and of

former General Dynamics employees. These witnesses have each had access to highly sensitive data. They would be questioned about their knowledge of the Phalanx's operation and defects. Perhaps some of this evidence is unclassified, as plaintiffs contend, or is contained in Congressional reports and other public sources. But the danger that witnesses might divulge some privileged material during cross-examination is great because the privileged and non-privileged material are inextricably linked. We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed.

The government maintains that, even if the data is available from non-secret sources, acknowledgement of this information by government officers would still be damaging to the government, because the acknowledgement would lend credibility to the unofficial data. *Fitzgibbon v. Central Intelligence Agency*, 911 F.2d 755, 765-66 (D.C.Cir.1990); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied*, 421 U.S. 908, 95 S.Ct. 1555, 43 L.Ed.2d 772(1975); and *Afshar v. Department of State*, 702 F.2d 1125, 1130 (D.C.Cir.1983). These cases stand for the proposition that disclosure of information by government officials can be prejudicial to government interests, even if the information has already been divulged from non-government sources. *Afshar*, 702 F.2d at 1130 ("Official acknowledgement by an authoritative source might well be new information that could cause damage to national security"). This contention has a troubling sweep, but we do not rest upon it, because we need not.

Plaintiffs argue that dismissal of their case was an overly harsh remedy for the potential security risk posed by the trial of this case. Dismissal is a harsh sanction. But the

results are harsh in either direction and the state secret doctrine finds the greater public good - ultimately the less harsh remedy - to be dismissal. Where "assertion of the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim, dismissal is appropriate." *Zuckerbraun*, 935 F.2d at 547. No intermediate solution such as those proposed by plaintiffs, as ably and creatively as their counsel has put it, can fully protect the United States' interest in keeping its state secrets undisclosed.

III.

The district court dismissed the claims on the alternative ground that they presented a non-justiciable political question outside the competence of the federal courts. We affirm on other grounds. We do not address this argument and express no opinion about its applicability.

IV.

Bareford raises two due process objections to the procedures of the district court. First, they argue that the district court should have provided a transcript of the proceedings that occurred during the *ex parte in camera* proceeding. Second, the plaintiffs argue that the district court should have given the plaintiffs more notice of the *ex parte, in camera* hearing.

Bareford's counsel was notified of the government's intent to produce more documents to the district court *in camera* on the same day that the court began its *in camera* review of these documents. Bareford contends that this does not constitute adequate notice for the plaintiffs to make a timely objection to the *in camera* proceeding. The government contends that this notice was sufficient to allow

the plaintiffs' counsel to raise objections to the *in camera* proceeding on the following day, when the district court conducted the hearing on the defendants' motion to dismiss. The government should have provided notice to allow the plaintiffs to object to the *in camera* proceeding before it occurred. *United States v. Hall*, 854 F.2d 1036, 1042 (7th Cir. 1988) (party should have notice of request for *in camera* review adequate to allow party to respond to request). This error does not require reversal, however, because Bareford's claim is dismissed without relying upon the materials produced by the government *in camera*. Any error was therefore harmless.

The district court did not provide a transcript of the *in camera* proceeding. This court cannot review a proceeding of which no record was made. *United States v. Southard*, 700 F.2d 1, 11-12 (1st Cir.), *cert. denied sub nom. Ferris v. United States*, 464 U.S. 823, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983) (district court should make transcript of *in camera* proceeding). For the reasons indicated above, however, any error in the *in camera* hearing was harmless.

V.

Plaintiffs challenge on First Amendment grounds the district court order to the parties not to communicate any information about the litigation to anyone except essential legal staff. This question is moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAWRENCE M. BAREFORD, et al.	)	**IN ADMIRALTY**
Plaintiffs,	)	**CIVIL ACTION**
v.	)	
GENERAL DYNAMICS CORPORATION, et al.	)	**NO. G-90-118(SBK)**
Defendants.	)	

OPINION

This is an action arising out of the Iraqi attack on the USS STARK on May 17, 1987. While cruising in the Persian Gulf, the USS STARK was hit by two Exocet anti-ship missiles fired by an Iraqi F-1 Mirage fighter; thirty-seven sailors were killed and several others were injured. The families and dependents of 23 crewmembers and two injured sailors brought suit to recover compensation from various military defense contractors based upon theories of negligence, breach of implied warranties of fitness, products liability, fraud and misrepresentation and deceptive trade practices. Each of these claims relate to the design, testing and manufacture of the radars and weapons systems aboard the USS STARK, and how the failure of these systems caused the deaths and injuries resulting from the Iraqi attack.

The United States intervened in the case and filed a motion to dismiss based on the grounds that the plaintiffs cannot prove a prima facie case without disclosing state secrets and that it is impossible to inquire into whether the

defense systems were defective or whether any defects caused the injuries without intruding into military operations and decisions which are political questions not subject to judicial review. The private defendants also filed motions to dismiss, based on the state secrets privilege, political question doctrine, espousal and the combatant exception to the Federal Tort Claims Act.

After reviewing all of the legal memoranda, including affidavits and exhibits attached thereto, presented by all the parties as well as classified documents reviewed by the court in camera, the court grants the motions to dismiss. For the reasons stated below, the complaint is dismissed on two independent grounds: the state secrets privilege and political question doctrine.[1]

At the request of the Government, this court takes judicial notice of the following facts:[2]

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1. The private defendants argued that the doctrine of espousal requires dismissal of this case. Espousal is the international law term for the practice by which a government undertakes to pursue on a diplomatic level the claims of its nationals against a foreign sovereign. *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981). Private defendants suggest that the decision by the United States to espouse the claims for the deaths and injuries of the sailors bars the instant lawsuit. The court does not find this argument persuasive.

Private defendants also argued that the combatant activity exceptions to the Federal Tort Claims Act, 28 U.S.C. § 2680 (j), should be extended to provide immunity to military defense contractors in cases arising out of the engagement of United States forces in combat. As the court has granted their motion to dismiss based on the state secrets privilege and political question doctrine, there is no need to address this novel issue.

2. In considering a motion to dismiss, the court may take judicial notice of certain facts. *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1388 (9th Cir. 1987), *cert. denied.* ___U.S.___, 108 S. Ct.

The war between Iran and Iraq, which began in 1980, has resulted in over 450 air attacks on Persian Gulf shipping from 1984 to 1987, with an increasing number of attacks on ships trading with Kuwait. In 1986 Kuwait sought protection from Iranian attack on their shipping from the United States, Soviet Union, Great Britain, France and China. A major objective of the national security policy of the United States in 1987 was ensuring the continued access by the Free World to the oil supplies in the Persian Gulf. In 1987, the United States agreed to reflag Kuwaiti ships under U.S. registry and provide naval protection for such ships. The United States maintains a continuing naval presence in the Persian Gulf to escort American flag ships and certain ships especially reflagged as American and to respond to attacks on American flag and other neutral ships. After the aerial attack on the USS STARK by an Iraq warplane on May 17, 1987, the Government of Iraq, pursuant to an international agreement, provided $27,350,374.00 in compensation to the United States for claims arising out of the deaths of 37 individuals, including plaintiffs' decedents. Iraq transferred this amount to the United States, which in turn, distributed the checks to the individual beneficiaries of this claims settlement.[3] In response to Iraq's invasion of Kuwait, the United States has deployed additional naval forces to the Persian Gulf and since January 1991 has been at war with the Government of Iraq.

2031 (1988). See Rule 201, *Fed. R. Evid.* There has been no objection by plaintiffs to the Government's request to take judicial notice of these facts.

3. After the STARK tragedy, Iraq also agreed to provide compensation for the damages suffered by the injured sailors and the ship. Although the wrongful death claims have been paid, the personal injury and property damage claims have not.

DISCUSSION

In considering a motion to dismiss, the court must assume that all facts alleged in the complaint are true. The court may grant the motion, however, if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

1. *State Secrets Privilege*

The privilege of refusing to reveal military or diplomatic secrets is well-established and dates back to Aaron Burr's trial for treason. *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390 (S.D.N.Y. 1982), citing *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14, 692d). In *Totten v. United States*, The Supreme Court stated that a case must be dismissed when the subject matter of the litigation should be treated as confidential. 92 U.S. 105 (1875) (Plaintiff contracted with President Lincoln to act as a secret agent during the Civil War and later sued to secure payment.)

In *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court established the requirements and scope of the state secrets privilege. The Court held that the privilege belonged to the federal government and may only be asserted by it. In order to invoke the privilege, the head of the department which has control over the subject matter must file a formal claim of privilege after personal consideration of the classified information at issue.

In assessing the government's assertion of the privilege, the court should accord "the utmost deference to executive assertions of the privilege." *National Lawyers Guild*, 96 F.R.D. at 398, citing *Halkin v. Helms*, [*Halkin I*],

598 F.2d 1, 9 (D.C. Cir. 1978), citing *United States v. Nixon*, 418 U.S. 683, 710 (1974); however, the court should not abdicate judicial control of the evidence in the case to the executive. *Reynolds*, 345 U.S. at 9. Once the court determines that disclosure of the information necessary to prosecute the case would pose a reasonable danger to national security, then the needs or interest of the litigants in desiring to make the information public are set aside and the case must be dismissed. *Reynolds*, 345 U.S. at 11; *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399, 402 (D.C. Cir 1984); *Halkin v. Helms*, [*Halkin II*], 690 F.2d 977, 990-91 (D.C. Cir. 1982).

Where prosecution of the claim would require the disclosure of information protected by the state secrets privilege, dismissal of the action is warranted. *Totten*, *supra*; *Farnsworth Cannon v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc); *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Halkin II*, *supra*; *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989); *Bailey v. Varian Associates*, CA No. 89 2338 (N.D. Cal. June 11, 1990) (appeal pending). Similarly, if classified military information is "so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privilege," the case must be dismissed in its entirety. *Fitzgerald*, 776 F.2d at 1241-42; *Farnsworth*, *supra*; *Zuckerbraun v. General Dynamics, et. al*, 1990 U.S. Dist. LEXIS 18218, (D. Conn. 1990) (appeal pending); *Nejad*, *supra*; *Bailey*, *supra*.

It is well-established that the state secrets privilege may be invoked to protect against disclosure of classified or sensitive information relating to the country's national defense. *Reynolds*, 345 U.S. at 10; *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983); *Northrop*, 751 F.2d at 399. A country's national security system is the "most confidential

information a country can possess." *Northrop*, 751 F.2d at 402. The privilege has been upheld in cases to prevent the disclosure of technical information concerning weapons systems aboard naval ships as well as the rules of engagement (ROE). *Zuckerbraun*, *supra*; *Nejad*, *supra*; *Bailey*, *supra*.

Both *Nejad* and *Bailey* arose out of the 1988 incident in which Iran Flight 655 was shot down by missile fire from the USS VINCENNES. Similar claims for negligence, products liability and breach of warranties of fitness were filed against the defense contractors. In *Nejad* and *Bailey*, the courts found that the cases could not be adjudicated without revealing military secrets relating to the weapon's technology, the disclosure of which would be harmful to national security.

In *Zuckerbraun*, a substantially identical products liability case arising out of the May 17, 1987 Iraqi attack on the USS STARK was filed. Motions to dismiss were filed on the same grounds alleged in the instant case and Secretary Garrett filed an affidavit identical to the one filed herein. The court granted the motions, holding that plaintiff could not present a prima facie case without revealing state secrets and the case presented nonjusticiable issues under the political question doctrine.

In the present case, all the requirements set forth in *Reynolds* for asserting the state secrets privilege have been satisfied. The Secretary of the Navy, H. Lawrence Garrett, III, has presented the court with his affidavit, asserting a formal claim of privilege after personal consideration of the information which would have to be disclosed during preparation for and trial of this case. He has further described the effect on national security such disclosures would have. Secretary Garrett determined that the technical

capabilities and other details concerning the weapons systems which allegedly failed and the ROE under which the USS STARK operated during the attack cannot be disclosed without risking serious damage to our nations's security. Secretary Garrett stated further that the material deficiency reports addressing performance or technical deficiencies as well as reports addressing uncorrected deficiencies, whether known at the time the weapons were delivered to the Navy or later detected in the course of their operation, are themselves classified.

The Secretary's declaration sets forth in detail the significance of the Phalanx and other defensive systems aboard the STARK to the national security of the United States. The declaration further described the sensitive nature of the capabilities and limitations of radars and weapons systems installed on naval ships or other platforms and the threat to national security resulting from revelation of this material, which would be essential to prove or disprove plaintiffs' claims. Disclosure of technology relating to our defense systems would permit foreign powers to exploit weaknesses and adopt counter-measures. This is particularly harmful because the systems at issue represent significant advancements in technology and the ships equipped with such weapons are expected to be present into the twenty-first century. Although Secretary Garrett's declaration was prepared several months before the war with Iraq began, his statements take on more significance in light of the present conflict.

The Secretary further concluded that

> [d]isclosure of the rules of engagement under which USS STARK operated would enable potential adversaries to predict more accurately the rules governing U.S. Navy ships in high threat

> environments. With such knowledge, an adversary could take action against an American vessel with greater assurance that an American response was prohibited, or could graduate its provocation, and time the massing of its forces, in a way calculated to disable the United States.

Affidavit at 12-13.

Plaintiffs have challenged the Secretary's affidavit with affidavits of James H. Webb, Jr., former Secretary of the Navy at the time of the STARK incident, Glenn R., Brindel, former commanding officer of the USS STARK in May 1987 and Thomas S. Amlie, an assistant for technical systems in the office of the Assistant Secretary of the Air Force. Messrs. Webb, Brindel and Amlie suggest that the classified information, which Secretary Garrett stated would be implicated in this case, should not be classified or that declassification would not impact national security. The current Secretary is the official responsible for exercising judgment as to what information should remain classified for reasons of national security. The declarants relied upon by plaintiffs are not in a position to know of the United States' present need for secrecy. It has been almost three years since Mr. Webb was Secretary, and unlike Secretary Garrett, Mr. Webb no longer has access to or control over the state secrets which are subject to the privilege in this case.

> There is a practical reason for avoiding judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). The declarants do not have the data available to Secretary Garrett to make an informed judgment as to what types of information should be classified in the interest of national security.

Mr. Webb admits that classified information would be implicated in this case, but he believes it should be declassified due to the nature of plaintiffs' claims. Once the privilege has been properly invoked, however, it is absolute. There is no balancing of the interest of private litigants against the secrets of state. *Ellsberg*, 709 F.2d at 57; *Reynolds*, *supra*. The "balance has already been struck" in favor of protecting state secrets over the interest of private litigants. *Halkin II*, 690 F.2d at 990; *In Re United States*, 872 F.2d at 476.

Plaintiffs also challenge the classification of the information because they claim much of it is in the public domain. In support of their argument, they have provided the court with eleven congressional reports or letters, twenty-two media articles and five declarations. The state secrets privilege is not waived unless the information is disclosed by a public official in a position and with the authority to disclose it. *Knopf v. Colby*, 509 F.2d 136 (4th Cir. 1975, *cert. denied*, 421 U.S. 992, *reh'g denied*, 422 U.S.1045 (1975); *Fitzgibbon v. CIA*, 911 F2d 755 (D.C. Cir. 1990). Publication of newspaper articles and congressional committee reports which may contain classified information does not alter the fact that the information is classified and may not be officially acknowledged. *Fitzgibbon*, 911 F.2d at 765-66. See *Marchetti*, *supra*. Moreover, official acknowledgement of a fact which has already been the subject of widespread media attention can in and of itself damage national security. *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983); *Fitzgibbon*, 911 F.2d at

766. In the areas of intelligence and national security, there is a significant difference between official and unofficial disclosure of information.

An in camera review of classified documents is unnecessary when the court is satisfied "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. Based on the briefs and exhibits presented from both sides, this court agrees with the holding in *Zuckerbraun* that "it is apparent from all the circumstances involved that there is a reasonable danger that disclosure of the information in question would pose a threat to national security." 1990 U.S. Dist. LEXIS 18218, at 14-15.

Although not required, this court accepted the offer of the United States to present certain documents for an in camera review.[4] The court was satisfied before the in

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4. Plaintiffs objected to the in camera review on the grounds of lack of due process, not being present at the production and not having an opportunity to review the classified materials. Private counsel have no right to be present at an in camera production of documents which are the subject of a sate secrets privilege. *Ellsberg*, *supra*; *Halkin I*, *supra*; *Jabara v. Kelley*, 75 F.R.D. 475, 486-487 and n. 37 (E.D. Mich. 1977).

When the normal rights of a private litigant are inconsistent with the need for an in camera production of documents, the rights of the litigant must take a back seat to that of the sovereign in protecting its state secrets. *Jabara*, 75 F.R.D. at 486-487. "The rationale for this rule is that our nations's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." *Ellsberg*, 709 F.2d at 61.

The documents reviewed included the unabridged Navy Report

camera review that there was a reasonable danger that disclosure of information relevant to this lawsuit would threaten national security. After reviewing the classified materials, it is absolutely clear that the state secrets privilege has been invoked properly and that the statements made in Secretary Garrett's declaration are correct.

Once the court finds that the privilege has been invoked properly, it is necessary to determine whether and to what extent the court may proceed with this case. In doing so, the court should consider the ability of the plaintiffs to be able to prove their claims without disclosing state secrets. Although in deciding how far to probe the assertion of the privilege, the court must consider the parties' need for proof, the balance is not evenly struck; i.e., "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11, citing *Totten*, *supra*. (action dismissed on the pleadings). Faced with the same dilemma, the *Zuckerbraun* court concluded:

> In order to prove his allegations that the defendants negligently and defectively designed, manufactured, and tested the weapons systems, that the weapons were not fit for their intended purpose, and that General Dynamics negligently tested the weapons and intentionally misrepresented the test results, the plaintiff would have to conduct an examination of the capabilities and limitations of the defensive systems installed on the USS STARK. According to the

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of Investigation without exhibits, an affidavit of Vice Admiral Kihune, Assistant Chief of Naval Operations (Surface Warfare) and a memorandum of the United States addressing the substance of these two documents. All of the materials presented to the court for its in camera review were classified "secret".

> Secretary, the capabilities and limitations of these weapons systems are classified state secrets which may not be revealed. Furthermore, as defendants argue, in order to establish that the weapons system caused the harm, an inquiry into the conduct of the crew of the USS STARK would be necessary. This inquiry would have to include an examination of the applicable rules of engagement, the orders issued by the naval chain of command, and whether those orders were properly carried out. Again, the Secretary has asserted that the rules of engagement are classified state secrets which may not be revealed.

1990 U.S. Dist. LEXIS 18218, at 16-17.

Among the elements of a product liability claim are proof of a defective product and that the defect proximately caused the injury. In this case, this court is satisfied that neither of these elements could be proven without release of classified information. "This is one of those situations where 'the very question upon which the case turns is itself a state secret.'" *Zuckerbraun*, 1990 U.S.Dist. LEXIS 18218, at 16, citing *Fitzgerald*, 776 F.2d at 1239, n. 3.

While this court acknowledges that it is an extraordinary measure to dismiss a lawsuit at the outset without giving the plaintiffs an opportunity to conduct discovery, it is a decision which is supported by precedent and the circumstances of this case. Numerous courts have dismissed cases where prosecution of the claims would result in unwanted disclosures. *Zuckerbraun*, *supra*; *Farnsworth*, *supra*; *Totten*, *supra*; *Fitzgerald*, *supra*; *Halkin II*, *supra*; *Nejad*, *supra*; *Bailey*, *supra*; *Guong v. United States*, 860 F.2d 1063 (Fed Cir. 1988).

Proof of plaintiffs' theories would require them to

conduct an examination of the design requirements for multiple defensive systems. To prove the allegations in their complaint, they would have to delve into the specifications and capabilities of the radars and other defense systems, the crucial details of which are classified. The type of information classified in each of the several defense systems are discussed in the Secretary's declaration. The details essential to plaintiffs' claims are classified.

Further, to prove that the alleged defective products were the proximate cause of the ship's failure to successfully defend herself against the attack, the ROE would have to be examined to ascertain the applicable orders when the STARK is aware of an approaching aircraft and to what extent those orders were followed. The applicable ROE contained in the Navy Report of Investigation are classified.

Plaintiffs have made a valiant effort at showing they could prove a prima facie case without classified information by presenting the court with several declarations and numerous exhibits. However, even if they attempted to avoid requests for classified information, which is unlikely, this court is absolutely convinced that there is a substantial risk such information would be released inadvertently or directly by a process of elimination. The Fourth Circuit, en banc, considered this possibility and held:

> In an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing. It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state

> secrets precludes any further attempt to pursue this litigation.

Farnsworth, 635 F.2d at 281.

Attempts by plaintiffs to present a prima facie case would inevitably disclose classified information, which would be detrimental to our nation's security and to the men and women fighting in the Persian Gulf. The potential witnesses in this case, such as the ones who have prepared affidavits for plaintiffs, have had access to classified information and are prohibited from disclosing that information. For some of them, it has been several years since they have had access and a need to know that information. Over time, memories fade as to the distinction between what is and is not classified. There is an obvious risk that they may inadvertently reveal details which are classified and should not be disclosed. When former employees, such as Messrs. Brindel and Webb, rely on their own judgments as to what information is detrimental, they may reveal facts which the Navy, with its broader understanding of what may reveal classified information, would consider harmful. See *Snepp v. United States*, 444 U.S. 507 (1980).

Even if plaintiffs could present a prima facie case without disclosing classified information, defendants would need to use classified material to cross-examine witnesses and present their defense. If this classified information could establish a defense to the claim, dismissal would be appropriate. *In Re United States*, 872 F.2d at 476. See *Molerio v. F.B.I.*, 749 F.2d 815, 825 (D.C. Cir. 1984).

Plaintiffs suggest that access to the classified information can be limited to counsel or that the case could be tried in camera or before the bench. These suggestions are unworkable when the case, such as the instant one,

encompasses so much classified information. When the very subject matter of the case is classified or the issues raised are permeated with secret information, the case cannot proceed. The Secretary's invocation of the state secrets privilege was proper and this court finds that plaintiffs cannot prove their case without revealing classified information; therefore, the case must be dismissed.

2. *Political Question Doctrine*

A second independent basis for dismissal is the political question doctrine. Suits raising "political questions" are nonjusticiable, and therefore, not "cases or controversies" within the meaning of Article III of the Constitution. *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo*, 577 F.2d 1196, 1203 (5th Cir. 1978, *cert. denied*, 442 U.S. 928 (1979).

In *Baker v. Carr*, the Supreme Court identified six characteristics of nonjusticiable issues:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). The appearance of any one of these factors compels dismissal of the matter as a nonjusticiable political question. *Id.* See also *Occidental*, *supra*.

The United States and the private defendants argue that the conduct of foreign policy and military operations are committed to the Executive Branch and that there is a lack of judicially manageable standards for resolving this case due to the military nature of the incident. The conduct of military operations and foreign policy are committed by the Constitution to the Executive Branch of government. Article II, §2, vests the President with exclusive authority over the armed forces of the United States as Commander-in-Chief, and over the conduct of foreign affairs. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), inasmuch as they are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 242 U.S. 580, 589 (1952).

In *Gilligan v. Morgan*, the Supreme Court explained the reasons why courts traditionally avoid second-guessing military decisions:

> It would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military

> judgments, subject *always* to civilian control of the Legislative and Executive Branches.

413 U.S. 1. 10 (1973). The "composition, training, equipping, and control" of the United States naval forces in the Persian Gulf, and specifically the USS STARK, are precisely the decisions which this court would have to scrutinize in adjudicating plaintiffs' claims. It appears unavoidable that the STARK incident will implicate "military decisions which are committed to the executive branch and for which the court lacks judicially manageable standards." *Zuckerbraun*, 1990 U.S. Dist. LEXIS 18218, at 23.

Even if plaintiffs were able to prove without classified information that the weapons aboard the STARK were defective, the court must still determine whether the defective equipment caused the sailors to unsuccessfully defend against the attack. In determining this causation issue, the court would have to consider the readiness and state of alert of the crew; training of the crew with respect to identification of hostile aircraft and the operation of defense systems, including how and when they are to be used; whether it would have been reasonable for the crew to classify the Iraqi aircraft as hostile; what a reasonable response would have been; the actual capabilities of the crew to respond to the Iraqi fighter with and without defective equipment and whether such action would have been successful, given the capabilities of the weapons systems and the men handling them.

Even assuming that this information could be presented without revealing classified information, this court would have to render decisions that would implicate military tactical operations. Defendants have indicated that their defense would attempt to show that the naval crew should have initiated a preemptory strike against the Iraqi fighter;

the applicable ROE were inappropriate for the circumstances; and that military orders were not carried out or that the tactical decisions of the crew were flawed. There are few "area[s] of governmental activity in which the courts have less competence" to act than in the area of military decision-making. *Gilligan*, 413 U.S. at 10; *Owens v. Brown*, 455 F. Supp. 291, 299 (D.D.C. 1978). This case provides this court with a myriad of issues for which it is not equipped to create manageable standards. This court lacks the "standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life." *Rappenhacker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980); *Zuckerbraun*, *supra*.

Plaintiffs argue that the political question doctrine has no application to cases alleging product liability claims against military defense contractors. The basis for plaintiffs' argument is that the government contractor defense, explained by the Supreme Court in *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988), provides the only standard by which the court may determine whether plaintiffs may prevail in their action. Plaintiffs confuse the threshold jurisdictional inquiry required under the political question doctrine with an affirmative defense which may be pleaded by defendants.

The political question doctrine is based upon the constitutional principle that the Judiciary may not interfere with military and foreign policy matters committed to the Executive. The government contractor defense, however, is rooted in the concept of sovereign immunity. *Boyle*, 108 S. Ct. at 2513. Under *Boyle*, there is no liability for design defects in military equipment if the United States approved and the product conformed to the specifications and the contractor warned the United States about dangers in the use of the product known to the contractor and unknown to the

government.

There is nothing in the *Boyle* decision to suggest that it supplants the political question doctrine in cases raising products liability claims against defense contractors. Plaintiffs have not cited any cases where a court, in examining the political question doctrine, abandoned the *Baker v. Carr* analysis in favor of the government contractor defense.[5] There are, however, at least three cases which have applied the political question doctrine to product liability claims against military contractors. *Zuckerbraun*, *supra*; *Nejad*, *supra*; *Bailey*, *supra*. The court finds that at least the first two characteristics of *Baker v. Carr* are present in this case, and therefore, must dismiss the complaint.[6]

February 25, 1991 /s/ Samuel B. Kent
DATED UNITED STATES DISTRICT JUDGE

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5. The cases cited by plaintiffs involve defective military equipment; however, none of them raised political questions.

6. Defendants also contend that the United States' demand for compensation under international law from the Government of Iraq would be undermined if this suit was allowed to proceed. They also argue that inconsistent "official" opinions on liability for the STARK incident would undermine current foreign policy positions. As the court finds the first two characteristics of *Baker v. Carr* applicable, these additional contentions do not require discussion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAWRENCE M. BAREFORD, et al., Plaintiffs	§	
VS.	§	**CIVIL ACTION NO. G-90-118**
GENERAL DYNAMICS CORPORATION, et al., Defendants.	§	

FINAL JUDGMENT

Still pending before the Court are Plaintiffs' Motion to Abate. Plaintiffs' Motion to Apply Other Options, and Plaintiffs' Motion for *In Camera* Deposition. By this Order, the above Motions are DENIED.

Further, and in accordance with this Court's "Opinion" filed on February 25, 1991, this case is DISMISSED in its entirety, pursuant to Fed. R. Civ. Pro. 12(b)(6).

This is a FINAL JUDGMENT.

SIGNED at Galveston, Texas, this 10th day of April, 1991.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent text of constitutional provisions involved is set out below.

U.S. Const., amend. I: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

U.S. Const. art. IV, § 2: "The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several states."

U.S. Const., amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const., art. III, § 2: "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . under their Authority;. . .

"--to Controversies . . .

"--between Citizens of different States . . ."

U.S. Const., art. II, § 2: "The President shall be Commander in Chief of the Army and Navy of the United States . . . [and] He shall have Power . . . to make Treaties . . ."

SUITS AGAINST THE UNITED STATES
Effect Of Assertion Of State Secrets Privilege

United States Supreme Court

United States v. Reynolds, 345 U.S. 1(1953).
Remand case for litigation without privileged information.

Second Circuit

Clift v. United States, 597 F.2d 826 (2d Cir. 1979).
Remand case for consideration of "appropriate stay" until national security threat no longer exists.

Halpern v. United States, 258 F.2d 36(2d Cir. 1958).
Remand case for consideration of *in camera* trial.

National Lawyers Guild v. Attorney General, 96 F.R.D. 390 (S.D.N.Y. 1982).
Formal claim of privilege must be made for every item sought to be privileged on an item-by-item determination.

Spock v. United States, 464 F. Supp. 510 (S.D.N.Y. 1978).
Denial of government's motion to dismiss and schedule conference to consider procedures to safeguard state secrets.

Fourth Circuit

Bowles v. United States, 947 F.2d 91 (4th Cir. 1991).
Dismissal affirmed against government, but plaintiff could pursue case against private parties.

Siglar v. LeVan, 485 F. Supp. 185 (D. Md. 1980).
Dismissal granted as to estate's claims, but dismissal denied as to widow and daughter's individual claims.

Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980) (en banc per curiam).
(Grimes employed by Navy.) Dismissal affirmed.

Heine v. Raus, 399 F.2d 785 (4th Cir. 1968), *cert. denied*, 402 U.S. 914 (1971).
(Raus was paid undercover agent of CIA.) Summary judgment vacated to allow plaintiff to show defendant's libel was not authorized by CIA.

Fifth Circuit

Bentley v. United States, 16 F.R.D. 237 (M.D. Ga. 1954).
Investigation report not privileged; production required.

Sixth Circuit

Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977).
Requires *in camera* inspection of documents because of "compelling need" and government must provide limited answers to interrogatories.

Ninth Circuit

Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989).
Case against government and private parties dismissed.

District of Columbia Circuit

In re United States, 872 F.2d 472 (D.C.Cir. 1989), *cert. dism'd sub nom. United States v. Albertson*, 493 U.S. 960 (1989).
Mandamus to grant motion to dismiss denied. District court can police the litigation so as not to compromise national security, with item-by-item determination and other controls.

Molerio v. FBI, 749 F.2d 815 (D.C.Cir. 1984).
Dismissal affirmed on basis of *in camera* affidavit.

Ellsberg v. Mitchell, 709 F.2d 51 (D.C.Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984).
Reversed dismissal; provides instructions to district court on how to resolve.

Salisbury v. United States, 690 F.2d 966 (D.C.Cir. 1982).

Dismissal affirmed.

Attorney General v. The Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983).

Declines to dismiss although defendant needed privileged documents in aid of its defense.

Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982) ("Halkin II").

Dismissal affirmed on basis of lack of standing and mootness.

Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) ("Halkin I").

Affirmed dismissal with respect to certain claims; remanded for consideration of other claims.

United States v. Felt, 502 F. Supp. 74 (D.D.C. 1980).

Approves question-by-question objection procedure.

SUITS AGAINST PRIVATE PARTIES
Effect Of Assertion Of State Secrets Privilege

Second Circuit

Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991).

(Government intervened to assert privilege.) Dismissal affirmed.

Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130 (2d Cir. 1977).

(Government asserted privilege in response to production request.) Affirmed district court's denial of jury trial and reference of the case to a magistrate to protect secrecy.

N.S.N. International Industry v. E.I. DuPont de Nemours & Co., 140 F.R.D. 275 (S.D.N.Y. 1991).

(Government asserted privilege in response to production request.) Plaintiff allowed to proceed with "substantial evidence from other sources" but without privileged information.

Fourth Circuit

In re Under Seal, 945 F.2d 1285 (4th Cir. 1991).

(Government asserted privilege in response to production request.) District court ordered depositions conducted in secure facility with objections by government security officials. After depositions, plaintiff conceded that he

could not proceed to trial without privileged information. Summary judgment affirmed.

Fitgerald v. Penthouse International, Ltd., 776 F.2d 1236 (4th Cir. 1985).

(Government intervened to assert privilege.) Dismissal affirmed.

District of Columbia Circuit

Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395 (D.C. Cir. 1984).

Defendant can proceed with litigation without privileged information under proper controls.

Supreme Court, U.S.
FILED
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No. 92-1209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the petition for certiorari should be denied where the lower courts properly applied Supreme Court precedent in dismissing a product liability action on state secrets grounds and where there is no conflict among the circuits in their application of the state secrets privilege.

STATEMENT OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Pursuant to Sup. Ct. R. 29.1, Respondents hereby identify all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates:

General Dynamics Corporation—None

Hughes Aircraft Company—General Motors Corporation, EDS, ACCSCO S.A., American Mobile Satellite Corporation, AMRAAM International Licensing Company, ARINC Incorporated, Comlinear Corporation, Earth Observation Satellite Company, ELEK-LUFT Elektronik-und Luftfahrtgerate GmbH, EL-TRO GmbH, Empresa Nacional de Optica SA, First Portland Technology Corp., FLIR Systems, Inc., FLIR Systems, Inc., Guiado y Control SA, H & D Radio Frequency Identification Products, H & R Company, HBH Company, H. E. Microwave Corporation, HKV, HESI-FTIC Environmental Sciences, Inc., Hughes Environmental Systems-Federated Technologies Mississippi, Inc., Hughes-JVC Technology Corporation, Hughes-Kenwood RDSS, Inc., Hughes Software Systems Private Limited, i-Logix, Inc., Interactive Entertainment, Inc., International Electro-Optical Industry Anonim Sirketi, International Mobile Machines Corporation, Japan Communications Satellite Company, Inc., Japan Satellite Communications Network Corporation, MET, Microelectronics and Computer Technology Corporation, Nippon Avionics Co., Ltd., Pacific Monolithics, Inc., SJ & LA Associates, Software Productivity Consortium, Inc., UKADGE Systems Limited.

Unisys Corporation—Nihon Unisys, Ltd. (Japan), Tata Unisys, Ltd. (India)

Lockheed Electronics Company (Lockheed Sanders, Inc., successor by merger)—Lockheed Corporation

Vitro Corporation—PCC Technical Industries, Inc., GK Technologies, Inc., Pennsylvania Company, The Penn Central Corporation, The Charter Company, Spelling Entertainment, Inc., Chiquita Brands Inter-

national, Inc., American Financial Enterprises, Inc., Buckeye Partners, L.P., DI Industries, Inc., Sprague Technologies, Inc., Great American Communications, Inc., The Circle K Corporation, Provident Bancorp, Inc., Marsh Supermarkets, Inc., National Convenience Stores Incorporated, Sunshine—Jr. Stores, Inc.

Teledyne Inet, a division of Teledyne Industries Incorporated—Teledyne, Inc., Teledyne Canada, Limited

RCA Corporation, Government Systems Division—General Electric Company, Dart & Kraft Financial Corporation, GECC Financial Corporation, General Electric Capital Corporation, General Electric Capital Canada, Inc., General Electric Credit International, N.V., General Electric Financial Services, Inc., General Electric Overseas Capital Corporation, Montgomery Ward Credit Corporation, Montgomery Ward & Co., Inc., CAMCO, Inc. (Canada)*

Raytheon Company—PT HAS Service (Indonesia), Seismograph Service (Malaysia) Sdn. Bhd., Compania Mexicana de Exploraciones S.A., Seismograph Saudi Arabia Limited, Seismograph Service (Nigeria) Limited, Stearns Catalytic Ingenieria Y Construccion Chile, Limitada, Switchcraft De Mexico S.A. De C.V., Switchcraft Far East Company, Travel Air Insurance Co., Ltd., Raytheon Saudi Arabia Limited, New Japan Radio Co., Ltd., Compagnie des Tubes Electroniques (COMET), Process Industry Engineering (Pty) Ltd., ComLog Gesellschaft Fur Logistik GmbH, UME/SMAS, Raytheon Marine Sales and Service Company, Systems for Defense Company, Thoray Electronics, Inc., Digital Techniques, Inc., Bipolar Integrated Technologies, PerSeptive Biosystems, Inc., Militech, Speech Systems, Inc., Steinbrecker Corp., Sciteq Electronics, Inc., Cross Check Technology, Inc., Beta Phase, Inc., Sepracor Inc.

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* This list represents those RCA Corporation parents, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

FMC Corporation—FMC Corporation, FMC Gold Corporation

Rockwell International Corporation—None

Cardion Electronics—Ferranti International, Inc.

Advanced Technology, Inc., d/b/a PRC Inc.—Black & Decker Corporation, PRC Technology Services 1 of Virginia, Inc., PRC Technology Services 2, Inc., PRC Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1209

LAWRENCE M. BAREFORD, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises from a wrongful death action against manufacturers of missile defense systems and other equipment on board the U.S.S. STARK, which was hit by two missiles from an Iraqi fighter on May 17, 1987 in the Persian Gulf. The district court dismissed the action on two grounds: (1) that the action was not justiciable under the political question doctrine, and (2) that dismissal was required under the state secrets doctrine. The United States Court of Appeals for the Fifth Circuit affirmed the lower court's dismissal based on the state secrets ground, and did not reach the political question ground.[1] *Bareford v. General Dynamics Corp.*, 973 F.2d

[1] The political question ground of dismissal relied upon by the district court, but not reached by the Fifth Circuit, is not raised by the Petition for Certiorari.

1138 (5th Cir. 1992), *aff'g* No. G-90-118(SBK) (S.D. Tex. Feb. 25, 1991) (both opinions set forth in Pet. App.), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 12, 1993) (No. 92-1209). The Fifth Circuit's affirmance on state secrets grounds followed the Second Circuit's affirmance of a district court's dismissal of an almost identical product liability suit arising out of the same incident. *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991), *aff'g* 755 F. Supp. 1134 (D. Conn. 1990).

SUMMARY OF THE ARGUMENT

The requirements for a petition for certiorari are not satisfied here. There is no conflict among the circuits to justify Supreme Court review, and the courts below properly applied Supreme Court precedent in dismissing this action where plaintiffs could not prove their prima facie case without access to information properly protected by the state secrets privilege. The Petition for Certiorari is based on an alleged split among the circuits in the application of the state secrets doctrine. The Petition attempts to create the illusion of such a split by an appendix listing differing outcomes in cases in which the state secrets privilege was asserted. (Pet. App. at 37a-42a.) However, this superficial analysis does not establish a true conflict among the circuits, but merely reflects the widely different factual and procedural circumstances of the cited cases.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION FULLY COMPORTS WITH THIS COURT'S DECISIONS.

Petitioners assert that the decisions below are somehow inconsistent with this Court's requirements for the state secrets privilege, but this assertion is made in vague generalities and without support in the record. In fact, while Petitioners can disagree with the result below, they cannot point to any substantive or procedural aspect of

the Fifth Circuit's decision which violates this Court's precedents. Indeed, the courts below followed governing precedents to the letter.

A. The Courts Below Applied the Correct Procedural and Substantive Standards to the Executive's Invocation of the State Secrets Privilege.

This Court established the procedural and substantive requirements for invocation of the state secrets privilege in *United States v. Reynolds*, 345 U.S. 1 (1953). Procedurally, the privilege is properly invoked if there is "[1] a formal claim of privilege, [2] lodged by the head of the department which has control over the matter, [3] after actual personal consideration by that officer." *Id.* at 7-8. Substantively, the privilege is properly invoked if the government shows that the disclosure of the information poses a "reasonable danger" to secrets of state. *Id.* at 10.

There can be no doubt that the lower courts applied the procedural requirements correctly. As required by *Reynolds*, the United States invoked the state secrets privilege by making a "formal claim of privilege" in the Declaration of the Secretary of the Navy, H. Lawrence Garrett, III, who was undeniably the "head of the department which has control over the matter," and whose Declaration was expressly made "after actual personal consideration" by Secretary Garrett, as required by *Reynolds*. (Opp'n App. at 1a-2a, 12a).[2]

Petitioners' only quibble with the procedural aspects of Secretary Garrett's Declaration is not with the standard applied by the courts below, but is based on the fact that Secretary Garrett did not specifically review all 2,500 pages upon which Petitioners purport to rely. This page-by-page review is not required by *Reynolds*, and Secretary Garrett's Declaration sets forth in considerable

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[2] The Garrett Declaration is reproduced in its entirety in the Appendix to this Brief, and is cited herein as "Opp'n App."

detail the types of documents Petitioners would need and the reasons those documents cannot be disclosed. (Opp'n App. at 2a-12a.)[3]

The courts below also applied the correct substantive standard in assessing the propriety of the assertion of the state secrets privilege here. The substantive standard as set forth by this Court in *Reynolds* is whether the government has shown that the release of the information poses a "reasonable danger" to national security. *Reynolds*, 345 U.S. at 10. Again, this is precisely the standard applied by the Fifth Circuit, as its opinion makes clear: "The privilege for state secrets allows the government to withhold information from discovery when disclosure would be inimical to national security." (Pet. App. at 5a (citing *Zuckerbraun* and *Reynolds*).) The district court also applied the same standard: "Based on the briefs and exhibits presented from both sides, this court agrees with the holding in *Zuckerbraun* that 'it is apparent from all the circumstances involved that there is a reasonable danger that disclosure of the information in question would pose a threat to national security.'" (Pet. App. at 25a (quoting *Zuckerbraun*, 755 F. Supp. at 1139; citing *Reynolds*).)

Again, there can also be no doubt that, in addition to applying the correct substantive standard, the lower courts reached the correct result. Secretary Garrett's Declaration set forth in great detail the reasons why disclosure of the information at the heart of Petitioners'

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[3] Petitioners' assertion that the courts below "abdicated" their judicial responsibility by accepting "uncritically" the government's assertion of the state secrets privilege (Pet. at 11, 12) is refuted by the lower courts' opinions themselves. For example, the district court explained that it was satisfied "from *all* the circumstances," i.e., the parties' submissions in addition to the Declaration, that the information identified in the Declaration is crucial to the national security. (Pet. App. at 25a (quoting *Reynolds*, 345 U.S. at 10; *Zuckerbraun*, 755 F. Supp. at 1139) (emphasis added).)

case would pose a "reasonable danger" to the security of the United States. (*See* Opp'n App. at 10a-11a.)[4]

Accordingly, the decisions below correctly followed this Court's requirements for invocation of the state secrets privilege, and the Petition for Certiorari on this ground should be denied.

B. Dismissal of the Action Below Is Fully Consistent with This Court's Precedents.

Petitioners argue that, even if the state secrets privilege were properly invoked, the courts below should have allowed the action to go forward without the privileged material. This argument is not a proper basis for a petition for certiorari. Petitioners cannot point to any decision of this Court which is inconsistent with dismissal where plaintiffs cannot prove their prima facie case without access to privileged information. Petitioners' argument amounts only to a disagreement with the *result* of the lower court's analysis, not with the analysis itself.

There can be no doubt that under this Court's decisions dismisal of an action is appropriate where, as here, the very substance of the action is a state secret or where, as here, plaintiffs cannot prove their prima facie case without access to the privileged information. *Totten v. United States*, 92 U.S. 105, 107 (1875).[5]

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[4] Petitioners' argument that the Secretary was required to review their proffered data to properly invoke the privilege is simply unsupported by the case law. Secretary Garrett personally considered the subject matters and categories of classified information in properly invoking the privilege. Moreover, as the Garrett Declaration makes clear, the privilege covers materials which were classified according to Executive Order 12356. (Opp'n App. at 2a.)

[5] Petitioners argue repeatedly that this Court has not ruled in the state secrets area since *Reynolds*, as if this were an appropriate ground for issuing a writ of certiorari. In any event, this Court's recent reaffirmance of the principles of *Reynolds* and *Totten*, rendered almost thirty years after *Reynolds*, puts this issue to rest. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,

Although Petitioners repeatedly *assert* that they made out a prima facie case in their declarations and 2,500 pages of newspaper articles and similar documents, they never demonstrate how that case is, in fact, made by their submission. As both the district court and Fifth Circuit found, Petitioners' submissions fall well short of the showing required to meet their burden of proof. For example, the Fifth Circuit found that "Bareford has come forward with substantial evidence from which a judge or jury might find problems, or even wrongdoing, by General Dynamics in its production and testing of the Phalanx system. That alone will not establish a prima facie case." (Pet. App. at 9a.)[6]

Likewise, the district court, after reviewing Petitioners' evidence and the Garrett Declaration, determined that:

> To prove the allegations in their complaint, they would have to delve into the specifications and capabilities of the radars and other defense systems, the crucial details of which are classified. The type of information classified in each of the several defense systems are discussed in the Secretary's declaration. The details essential to plaintiffs' claims are classified.
>
> Further, to prove that the alleged defective products were the proximate cause of the ship's failure to

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454 U.S. 139 (1981), in holding that the Navy need not file an environmental impact statement which would reveal classified information posing a threat to national security, this Court reiterated its previous holding that " 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.' " *Id.* at 146 (quoting *Totten*, 92 U.S. at 107; citing *Reynolds*).

[6] Notably, the evidence proferred regarding product defects was directed only to General Dynamics, and not to any other defendant in this case.

> successfully defend herself against the attack, the ROE [rules of engagement] would have to be examined to ascertain the applicable orders when the STARK is aware of an approaching aircraft and to what extent those orders were followed. The applicable ROE contained in the Navy Report of Investigation are classified.

(Pet. App. at 28a.)

Finally, Petitioners' attempt to create a constitutional issue grounded in the right of access to the courts is also a red herring. Petitioners appear to assume that the right to sue is unconditional, a proposition which is unsupported and which directly conflicts with, among others, this Court's decisions in *Totten* and *Catholic Action*.

II. THERE IS NO CONFLICT AMONG COURTS OF APPEAL ON THE ISSUES PRESENTED BY PETITIONERS.

Supreme Court Rule 10.1(a) provides that certiorari may be granted to resolve a conflict among the circuits on a matter of federal law. "This means that there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., *Supreme Court Practice* 196 (6th ed. 1986). Petitioners have identified *no* such conflict among the circuits as to the propriety of dismissal when, as here, plaintiffs cannot establish a prima facie case without revealing state secrets. Petitioners' description of the existing case law on state secrets as "chaotic, conflicting, and at times . . . 'potentially frightening'" (Pet. at 8 (quoting *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 283 (4th Cir. 1980) (Murnagham, J., dissenting)) is inaccurate and misleading. It ignores a long history in which the circuit courts have uniformly and consistently applied Supreme Court precedent on the state secrets doctrine to different facts and circumstances. Indeed, the two circuits considering the state secrets doctrine on the facts in issue here

reached precisely the same result through a similar application of the state secrets privilege.

The Fifth Circuit in this case affirmed dismissal. After determining the validity of the privilege asserted, the *Bareford* court applied a two-part analysis. First, the court evaluated the nonprivileged evidence offered by Petitioners against their allegations, and found that the evidence "will not establish a prima facie case." (Pet. App. at 9a.) The court likewise found that Petitioners' evidence of the intended operation of the missile defense system does "*not* prove that the Phalanx system was intended to destroy the Iraqi missile in these circumstances, much less to prove why it failed to do so." (*Id.* (emphasis added).) Such proof would require "the type of judicial disclosure of state secrets the doctrine blocks." (*Id.*) Moreover, the court found that "[p]laintiffs have failed to demonstrate that this evidence is available to them as unclassified information. Accordingly, we conclude that dismissal was appropriate." (*Id.*)

The Second Circuit's opinion in *Zuckerbraun* is on all fours with the Fifth Circuit's *Bareford* opinion. In *Zuckerbraun*, the court affirmed dismissal of a wrongful death action arising out of the STARK incident after considering the same Declaration as here because the factual questions concerning liability "cannot be resolved or even put in dispute without access to data . . . . [which] is in its entirety classified and subject to the claim of privilege. *The very subject matter of this action is thus a state secret and there is no evidence available . . . to establish a prima facie case.*" *Zuckerbraun*, 935 F.2d at 547-48 (emphasis added) (citing *Reynolds*, 345 U.S. at 11 n.26 (citing *Totten*)).

Petitioners' appendix, listing several cases in which a court did not dismiss the action, does not reflect any conflict in the law regarding whether dismissal is an appropriate remedy where the state secrets privilege has been invoked. (*See* Pet. App. at 37a-42a.) No circuit

court, including the Fifth Circuit in this case, has ever held that dismissal must *inevitably* follow an assertion of the state secrets privilege. As the District of Columbia Circuit explained, "the outcome of a particular case depends on the purpose that the privileged information would have served. If the information is essential to establishing plaintiff's prima facie case, dismissal is appropriate." *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), *cert. dismissed*, 493 U.S. 960 (1989); *accord Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) ("Once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege."). Thus, the effect of the privilege on a lawsuit is determined on a case-by-case basis, and what Petitioners perceive as a "lack of uniformity" among the courts (Pet. at 16) is merely a difference in outcomes based on differing facts.

Specifically, the circuits agree that dismissal is necessary when, as here, a plaintiff cannot make out a prima facie case without privileged evidence. For example, in *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982), dismissal was affirmed after it became clear that plaintiffs lacked Article III standing because the information necessary to establish injury was privileged. *Id.* at 998-99; *see also Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983) (dismissal is proper when plaintiff cannot establish prima facie case without privileged information), *cert. denied*, 465 U.S. 1038 (1984). The Fourth Circuit recently affirmed summary judgment for a defendant in *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991), where the government asserted the privilege after preliminary discovery efforts proved unworkable under a protective order in a lawsuit for tortious interference with business.

> [I]n view of our holding that the evidentiary privilege was properly invoked, the correctness *vel non* of the summary judgment must be gauged on the present record without opportunity for further evidence. . . . "If the assertion of the privilege leaves

> plaintiff without sufficient evidence to satisfy a burden of persuasion, plaintiff will lose."

Id. at 1289 (quoting *Farnsworth Cannon*, 635 F.2d at 271-72).

The circuits also agree with the Fifth Circuit that dismissal is necessary when the core issues of a case are inextricably bound to the privileged material and trial will inevitably lead to disclosure of state secrets. In *Fitzgerald*, the Fourth Circuit affirmed dismissal of a defamation action because proving the truth or falsity of the libel would compromise state secrets. The court held that "the very subject of this litigation is itself a state secret. Because there was simply no way this particular case could be tried without compromising sensitive military secrets, we conclude that the district court did not err in ruling that the case must be dismissed." *Id.* at 1243 (footnote omitted); *see id.* n.11 ("[T]ruth or falsity of a defamatory statement is the very heart of a libel action."). In dismissing, the court followed the Supreme Court precedent set forth in *Totten v. United States*, 92 U.S. 105 (1875), where the existence of a contract to spy on confederate troops between the plaintiff and President Lincoln was deemed to be "a fact not to be disclosed." *Id.* at 107.

In *Bowles v. United States*, 950 F.2d 154 (4th Cir. 1991), the court held that when the subject matter of the litigation is privileged, and when "no amount of effort or care will safeguard the privileged information," dismissal is warranted. *Id.* at 156; *see also Molerio v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1984) (dismissal affirmed because "the whole object of the suit and of the discovery is to establish a fact that is a state secret"); *Salisbury v. United States*, 690 F.2d 966, 977 (D.C. Cir. 1982) (dismissal affirmed because " 'litigation [would] lead to the eventual discovery of privileged matters,' " and was not employed as a sanction under Fed. R. Civ. P. 37 for refusal to provide discovery) (quoting unreported decision below)).

In summary, the circuits agree that dismissal is appropriate and necessary under *Reynolds* and *Totten at any stage in the litigation* when it becomes clear that plaintiffs cannot prove their prima facie case without classified information, or the very subject matter of the litigation is privileged and further litigation would inevitably endanger secrets of state.

With respect to Petitioners' list of cases which did not result in dismissal (Pet. App. at 37a-42a), the differences in result stem from their facts, i.e., dismissal was either not in issue, or was inappropriate because the privileged material was not central to proof or defense. *See, e.g., Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) (affirming a quash on subpoenas to the government on state secrets grounds; dismissal not sought); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977) (dismissal not sought). For example, the D.C. Circuit refused to direct dismissal under mandamus because "plaintiff's claim did not present a case where 'the very subject matter of [the] litigation is itself a state secret.'" *In re United States*, 872 F.2d at 478 (quoting lower court's memorandum); *see also Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958) (finding a limited statutory waiver of the state secrets privilege under the Invention Secrecy Act of 1951); *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979) (following *Halpern*, remanded suit under 35 U.S.C. § 183 for trial after need for secrecy passed).

Simply put, there is no conflict among the circuits as to the law regarding the state secrets privilege. Given the extreme sensitivity of both the privileged information itself and the balance between the two branches of government, the cases have been handled with remarkable consistency among the circuits. Moreover, Petitioners' statement that the courts have "experimented in their attempts to satisfactorily resolve the competing constitutional interests" (Pet. at 8) reflects a highly appropriate

and healthy process in which this Court has no need to intrude. The courts uniformly apply the legal parameters established by Supreme Court precedent, fashioning the appropriate remedies to the facts of each case. Thus, there is no basis for granting Petitioners' request for certiorari.

CONCLUSION

For the above reasons, Respondents request that the Petition for Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

DECLARATION AND CLAIM OF THE STATE SECRETS PRIVILEGE OF H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY

I, H. LAWRENCE GARRETT, III, HEREBY DECLARE:

1. I am currently the Secretary of the Navy of the United States of America and the chief executive officer of the Department of the Navy. In this capacity I possess original TOP SECRET classification authority; this means that I am authorized by the President under Executive Order 12356 to determine the proper classification of information through the level of TOP SECRET on behalf of the United States.

2. As Secretary of the Navy, I am responsible for the administration of all activities within the Department of the Navy. The official activities of the Department of the Navy are many and diverse, but all have a single objective—the preservation of national security. In order to best achieve that objective, the Navy employs numerous weapons systems, defensive systems and other technical devices aboard warfighting ships around the world. These systems which are mounted on our ships and other weapons platforms are the foundation of the warfighting apparatus that provides the ultimate safeguard for our national security and means of carrying out our national foreign policy. Such systems were mounted on board the USS STARK in 1987.

3. USS STARK (FFG-31) is an Oliver Hazard Perry (FFG-7) class frigate. This class of ship comprises the United States' most advanced frigate. There are fifty-one (51) Oliver Hazard Perry class frigates commissioned; those frigates are the largest class of surface combatants in the U.S. Navy. Furthermore, USS STARK

and sister ships of the class are expected to be the United States' primary class of frigates well into the 21st century.

4. I have been advised of the pendency of the lawsuits filed in the United States District Courts for the Southern District of Texas (*Bareford v. General Dynamics, et al.*) and the District of Connecticut (*Zuckerbraun v. General Dynamics, et al.*) relating to the attack on the USS STARK on 17 May 1987 while that ship was operating in the Persian Gulf. I have reviewed the pleadings which contain allegations regarding the inadequate design, manufacture, testing and installation of shipboard weapons and defense systems on the USS STARK. I have concluded that litigation involving these allegations would of necessity require examination of the use and capabilities of these systems as well as the "rules of engagement," the orders the ship commanders operate under in determining whether and when to employ weapons and defensive systems. The Rules of Engagement and many features of the weapons systems relevant to the litigation of these suits are properly classified in accordance with Executive Order 12356, and the disclosure of this information reasonably would be expected to cause measurable damage to the national security of the United States.

5. Attorneys for the United States have reviewed with me the types of information that plaintiffs would require in order to establish legally sufficient claims. I have personally reviewed the classification of those types of information and determine that its disclosure would cause damage to the national security of the United States as further described below.

6. The types of classified information to which plaintiffs would require access to prove their *prima facie* case against the various defendants include:

a. The rules of engagement authorized for, and military operational orders applicable to, USS STARK at the time of the incident; and

b. General technical information regarding the design, performance and functional characteristics of combatant ships and the weapons and defense systems installed thereon, including operational and tactical tests and evaluations, and hardware applications and descriptions.

The classified aspects of several of the pertinent systems are more specifically set forth below.

7. The rules of engagement authorized for, and military operational orders applicable to USS STARK at the time of the incident are classified information. Rules of engagement and operational orders instruct commanders as to the circumstances under which—and the extent to which—they may employ weapons and defensive systems. Rules of engagement are based upon factors which include combat systems doctrine and intelligence estimates. In this case, the STARK's rules of engagement were tailored based upon threat assessments she was expected to face. Rules of engagement are classified in order to prevent potential aggressors from determining the circumstances under which—or the extent to which—U.S. forces will engage them.

8. General technical information regarding the design, performance and functional characteristics of combatant ships, when associated with specific tactical situations, constitutes classified information.

9. Design, performance, and functional characteristics of shipboard radar systems are classified, insofar as they pertain to:

a. Systems accuracy, including range, height, and bearing;

b. Range, including the maximum acquisition and tracking range;

c. The maximum altitude and elevation angle;

d. Radio frequency coverage;

e. Pulse lengths;

f. Antenna characteristics (horizontal and vertical beam with polarization);

g. Resolution (azimuth and range);

h. Waveform;

i. Pulse modulation characteristics and power output;

j. Systems capacity as to target capacity, data rate, or false alarm rate;

k. Design information as to threat recognition time; minimum discernible signal; signal processing; and modulation sensitivity and techniques;

l. Electronic Counter-Measures and Counter-Counter Measures (ECM/ECCM) capability as to:

(1) design and achieved goals;

(2) specification requirements;

(3) circuitry employed to obtain capabilities; and

(4) vulnerability to ECM.

m. Radar system reliability as to data concerning mean time between failures (MTBF) or mean time to repair (MTTR), or the level of reliability achieved by the radar system; and

n. Vulnerability of the radar system to blast, shock and other forms of counter-measures other than electronic counter-measures (ECM).

10. Operational and tactical performance features of shipboard radar systems are classified. (The term "performance" is specifically defined as: radar system accuracy in locating targets; or multiple target discrimination/resolution capability; or detection and probability of false alarm and target cross section are included; or target detection range when both probability of detection

and probability of false alarm and target cross sections are included; or antenna gain, sidelobe structure and scan characteristics.)

11. Shipboard radar system hardware is classified whenever disclosure of the hardware itself reveals classified aspects of the system such as those described above.

12. Design, performance, functional characteristics, and tactical or operational test data of the AN/SLQ-32(V)2 Electronic Counter-measure System is classified. The SLQ-32(V) counter-measures set is a 3-variant family of electronic warfare systems for defense of ships against the anti-ship cruise missile threat. The SLQ-32(V)2 provides operational capability for early warning of threat weapon system emitters; threat information to own ship hard-kill weapons; automatic dispensing of chaff centroid decoys; and active electronic counter-measures to alter radio frequency homing missile trajectories to achieve a miss. The following design performance and functional characteristics of this system are classified:

a. Accuracy:

(1) identification; and

(2) direction finding.

b. Control: interface with the Navy Tactical Data System (NTDS).

c. Range:

(1) of intercept; and

(2) target classification versus range capability.

d. Resolution:

(1) electro-magnetic (EM) parameter measurement;

(2) antenna beam patterns;

(3) target resolution/range/bearing;

(4) frequency response; and

(5) narrow bandwidth frequency response.

e. Signature characteristics:

(1) resolving bandwidth;

(2) transmission bandwidth;

(3) receiving sensitivity;

(4) noise figure;

(5) of hostile signals; and

(6) transmitter/jammer.

f. Reliability/Availability:

(1) system reliability mean time between failures (MTBF)/availability.

g. Systems capability:

(1) number of targets;

(2) operational capability with respect to threat environment defined by current ELINT information;

(3) effective radiated power;

(4) duty factor;

(5) response time;

(6) modulation techniques for specific emitters; and

(7) modulation techniques not related to specific emitters.

h. Vulnerability to electronic counter-countermeasures (ECCM).

13. Operational test and evaluation data of the SLQ-32(V)2 revealing deficiencies in the system which have not yet been corrected are classified.

14. The following features of the hardware of the SLQ-32(V)2 are classified:

a. An external view of the hardware of the display control console with the system operating and with operational software installed.

b. An external view of the display control console with System Diagnostic Test (SDT) software or Operator Training Software (OTS) installed.

c. Systems operating (power on):

(1) operational software;

(2) SDT or OTS software installed;

(3) OTS software or source listing;

(4) operational software program package:

(a) threat library source listing;
(b) operational software source listing; and
(c) ECM data base (isolation data) listing.

15. Design, performance, and functional characteristics of the MK-92 Fire Control System are classified insofar as they pertain to the following:

a. Counter-countermeasure capability of the system;

b. Vulnerability of system radar sets to countermeasures;

c. System accuracy;

d. System radar set resolution and target discrimination;

e. Operating frequencies of system radar sets;

f. Pulse coding/spacing of system radar sets;

g. System speed velocity—maximum targets;

h. System capacity—threat configurations to exceed response capability;

i. System vulnerability to blast shock;

j. MK-92 computer tapes MOD 1, MOD 2, and MOD 5, when these tapes are associated with classified WS-8506.

16. Tactics developed for the operational use (military application) of the MK-92 Fire Control System are classified.

17. The operational readiness of the MK-92 Fire Control system is classified.

18. The following aspects of the MK-92 Fire Control Systems hardware are classified:

a. Transmitter, Radar T-1085, when the system assigned frequency determining crystals are installed;

b. Complete crystal sets, when specific operating frequencies are identified and the crystals are installed in the radar transmitter T-1085; and

c. Weapons control consoles (WCC) MK-106 Mods 0 and 1, and MK-107 MOD 1, when the WCC's are operating under the control of the AN/UYK-7 computer.

19. The mission of the Navy's Close-In Weapons System (CIWS), popularly known as the "Phalanx," is to provide—as part of a defense in depth—a fast reaction, terminal defense against low flying, high speed anti-ship missiles penetrating other fleet defense. The system is an automatic, self-contained unit consisting of a search and track radar, digitalized fire control system, and a 20MM M61A1 gun mounted in a single above-deck structure. The following features of the Close-In Weapons System are classified:

a. Threat analysis data and conclusions;

b. Vulnerability of radar;

c. Numerical frequency bandwidth;

d. Specific frequency;

e. Detection/acquisition range;

f. Pulse width and repetition rate;

g. Accuracy and kill probability;

h. Test results which reveal the effectiveness of the weapon;

i. System reaction time;

j. Tactics developed for the operation use of the system;

k. Material deficiency reports addressing performance or technical deficiencies in the system/program;

l. Reports addressing uncorrected deficiencies which reveal degrading or inability of the system/program to function as designed; and

m. Evaluations or assessments of uncorrected material deficiencies, which reveal degrading of the system/program.

20. Chaff is material that is launched from the ship and which forms a radar target as a decoy for a threatening anti-ship missile. USS STARK was equipped with MK-182 chaff rounds. Design, performance, and functional characteristics of the MK-182 chaff rounds are classified insofar as they pertain to:

a. Functional data pertaining to the effectiveness of the decoy against hostile missiles;

b. Chaff frequencies and sizes when associated with the warhead;

c. The specific amount of chaff by frequency or length;

d. Chaff dispersion, range tables and trajectories;

e. Threat analysis data and conclusions;

f. Operational planning data and tactics;

g. Placement envelope requirements;

h. Information concerning the warhead when loaded with the chaff;

i. Information concerning the chaff when associated with the warhead; and

j. Test results.

21. In addition to the classified nature of USS STARK's specific weapons systems, general technical information regarding the ship and her integrated operational capabilities are also classified. For example, the following areas have been classified:

a. Ship general plans and general arrangement drawings; and

b. Combat System Technical Operations Manuals.

22. I have considered carefully the classified aspects of the above described weapons systems and have concluded that these systems enhance considerably the national security of the United States. I have also concluded that public disclosure of the classified information involved in these systems could reasonably be expected to cause grave damage to the national security. Since military application is made of these systems, it is my opinion that disclosures of classified information concerning them in litigation would permit foreign powers to exploit weaknesses and to adopt specific counter-measures. Disclosure of such information would provide potential enemies of the United States with detailed information regarding the capabilities of these weapons systems and the USS STARK, which would aid them in identifying potential areas of military vulnerability which may exist in those systems and in that ship and similar types of ships. Such disclosures would therefore permit potential enemies to develop and employ diversionary or deceptive tactics and

counter-measures with increased confidence, and to construct offensive actions with greater confidence in the likely United States' technical response and defense to those actions. The knowledge gained through disclosure of the classified aspects of these systems would greatly assist foreign powers and organizations that are aligned against the United States. These conclusions are based on my personal review of the weapons systems described above and upon my personal estimates of the possible and probable effects of inappropriate disclosures of information relating to those systems.

23. The defensive weapons installed in the USS STARK represent significant advancements in technology over corresponding systems in earlier classes of ships. Disclosure of such information would be particularly harmful because of the large number of Oliver Hazzard Perry class frigates and other ships equipped with those defensive weapons, and the lengthy period of service expected of those ships.

24. Disclosure of the rules of engagement under which USS STARK operated would enable potential adversaries to predict more accurately the rules governing U.S. Navy ships in high threat environments. With such knowledge, an adversary could take action against an American vessel with greater assurance that an American response was prohibited, or could graduate its provocations, and time the massing of its forces, in a way calculated to disable the United States.

25. The civil actions before these courts are predicated upon the design, manufacture, testing, use and maintenance of weapons systems employed aboard the USS STARK. Considering the classified nature of that subject matter, the development of evidence during the course of discovery and presentation of that information at trial unavoidably will call for information which is classified. Specifically, classified information relating to the potential military uses of those weapons systems will be called

for, either directly or by a process of elimination. Even if the parties attempted to exclude requests for classified information, I believe there is a substantial risk such information would be released inadvertently. Accordingly, I view my responsibility to protect the national security as requiring that I invoke the extraordinary measure of asserting a formal claim of the State Secrets Privilege over any information which would indicate, directly or indirectly, the classified technical information concerning the weapons systems at issue.

26. I certify that it would prejudice the national security to disclose the particular classified facts concerning these systems and the rules of engagement and I have personally determined that the claims which I now assert in this declaration are appropriate under the circumstances.

27. Upon personal consideration of this matter, including the types of classified information which plaintiffs would require to provide their *prima facie* case, it is my determination that disclosure of such information would impair the national security of the United States.

28. For these reasons, I invoke the "states secrets" privilege and deny access to such information in this lawsuit.

29. I declare under penalties of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

5 September 1990

/s/ H. Lawrence Garrett III
H. LAWRENCE GARRETT, III
Secretary of the Navy

SUPREME COURT, U.S.
MAR 17 1993
OFFICE OF THE CLERK

No. 92-1209

In the Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, ET AL., PETITONERS

v.

GENERAL DYNAMICS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of petitioners' tort claims arising out of an Iraqi missile attack on the *U.S.S. Stark* in order to protect against the disclosure of military secrets.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 973 F.2d 1138. The opinion of the district court (Pet. App. 16a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1992. A petition for rehearing was denied on October 14, 1992. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 17, 1987, an Iraqi F-1 Mirage fighter fired two Exocet missiles at the *U.S.S. Stark*. At the time of the attack, the *Stark* was on patrol in the Persian Gulf. The attack killed 37 crewmen and wounded 62 others. In the ensuing diplomatic exchanges, Iraq apologized for the attack and agreed to provide $27,350,374 in compensation for claims arising out of the deaths of the 37 crewmen. Iraq transferred that amount to the United States, and the United States distributed it to the individual beneficiaries of the settlement. Pet. App. 4a, 18a.

In June 1987, the Navy concluded its formal investigation into the attack on the *Stark*. The Navy concluded that the damage to the *Stark* was caused principally by failures of the captain and watch team. The Navy further concluded that the *Stark*'s weapons systems were capable of complying with the applicable rules of engagement and defending against hostile intent and imminent danger. Pet. App. 4a.[1]

2. Petitioners are the representatives of crew members of the *U.S.S. Stark* killed or injured in the Iraqi missile attack. In April 1990, they filed this action against General Dynamics Corporation and 28 other corporate defendants. Petitioners alleged that

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[1] The unclassified version of the Navy's report is part of the record in this case. The classified version of the report was submitted to the district court for its *in camera* review. The district court also reviewed *in camera* an affidavit of Vice Admiral Kihune and a memorandum discussing the accident reports and Admiral Kihune's affidavit. The court of appeals did not review any of these documents. The United States will make the documents available for the Court's review upon request.

defendants had negligently manufactured and tested the Phalanx Anti-Missile System and other defense and radar systems aboard the *Stark*, and had concealed test results. Petitioners claimed that the deaths and injuries of crew members resulting from the Iraqi attack were proximately caused by defendants' tortious conduct. Pet. App. 4a.

The United States intervened and moved for dismissal of plaintiffs' action in order to protect against the disclosure of state secrets. The Secretary of the Navy submitted a declaration formally asserting the privilege. The Secretary identified two types of classified information that might be compromised by trial of plaintiffs' tort claims: (1) classified information relating to the *Stark*'s rules of engagement and (2) classified technical information concerning the *Stark* and its weapons systems. See Pet. App. 22a.[2]

In response, petitioners filed numerous affidavits in an effort to establish a prima facie case of negligence and causation on the basis of assertedly unclassified material. Petitioners relied principally on the declaration of Glenn R. Brindel, the captain of the *Stark* at the time of the Iraqi attack, who asserted that the *Stark* would have defended itself successfully but for flaws in its equipment. Petitioners also introduced an affidavit from James Webb, Jr., a former Secretary of the Navy, who offered his opinion that allowing

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[2] The United States filed the same declaration in *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). The declaration is reprinted as an appendix to the Second Circuit's opinion in *Zuckerbraun*. It is also reprinted as an appendix to the Brief in Opposition of respondents General Dynamics Corp., *et al.*

petitioners' suit to go forward would not endanger national security. See Pet. App. 23a.

3. The district court concluded that dismissal of the plaintiffs' claims was necessary to protect against the disclosure of military and state secrets. Pet. App. 16a-34a. The court explained that in order to prove their case, the plaintiffs would have "to delve into the specifications and capabilities of the radars and other defense systems, the crucial details of which are classified." Pet. App. 28a. The court also explained that, to establish proximate cause, the plaintiffs would be required to examine the conduct of the crew of the *Stark*, including the applicable rules of engagement. The court noted that the rules of engagement are classified. *Ibid.*

The district court rejected plaintiffs' contention that dismissal was premature. The court concluded that any attempt to establish a prima facie case would involve witnesses who "have had access to classified information and are prohibited from disclosing that information." Pet. App. 29a. The court concluded that "[t]here is an obvious risk that they may inadvertently reveal details which are classified and should not be disclosed." *Ibid.* The court considered and rejected proposals for an *in camera* trial and similar suggestions advanced by petitioners because of the significant risk of disclosing state secrets. *Ibid.*

4. The court of appeals affirmed. Pet. App. 3a-15a. The court observed that the usual effect of the state secrets privilege is to exclude the privileged information from the case. Pet. App. 5a-6a. The court noted, however, that assertion of the privilege may require dismissal if the non-privileged information is not

sufficient to make out a prima facie case, or if "the very subject matter of plaintiff's action is a state secret." Pet. App. 6a, citing *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 274 (4th Cir. 1980).

The court concluded that petitioners could not make out a prima facie case without access to classified information. Pet. App. 7a-9a. The court acknowledged that petitioners submitted some 2,500 pages of affidavits and documents that they assert do not contain any classified information. But the court concluded that this evidence was not sufficient to establish a prima facie case. The court observed that petitioners' "claim of manufacturing and design defects requires proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals." Pet. App. 9a. The court concluded that "[t]his question cannot be resolved without access to detailed data regarding 'the design, manufacture, performance, functional characteristics, and testing of these systems.'" *Ibid.*, quoting *Zuckerbraun*, 935 F.2d at 547.

The court of appeals further concluded that a trial would jeopardize the integrity of important military secrets, and that, consequently, dismissal would have been required even if petitioners had been able to make out a prima facie case on the basis of unclassified evidence. Pet. App. 10a-14a. The court found a significant danger that witnesses would divulge privileged material "because the privileged and nonprivileged material are inextricably linked." Pet. App. 13a. Finally, the court held that "[n]o intermediate solution * * * can fully protect the United

States' interest in keeping state secrets undisclosed." [3] Pet. App. 14a.

ARGUMENT

Petitioners contend (Pet. 7-19) that the Court should grant review to resolve conflicts in the courts of appeals over application of the military and state secrets privilege. Contrary to petitioners' contention, the decision of the court of appeals in this case does not conflict with any decision of this Court or any other court of appeals. The only other court of appeals to have considered tort claims arising from the attack on the *Stark* held that dismissal was required to avoid a significant risk to military secrets crucial to the national security. *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). Accordingly, no further review is warranted.

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[3] The court noted that "[m]ost courts * * * have adopted the position that, if privileged information would establish a valid defense, then the court ought to dismiss the plaintiff's case." Pet. App. 10a (citing cases). But the court recognized that it did not need to reach that issue to decide this case, and therefore declined to address it. Similarly, the court of appeals declined to address the district court's alternative ruling that petitioners' claims present non-justiciable political questions. Pet. App. 14a.

The court of appeals rejected petitioners' arguments based on the *in camera* proceeding in the district court. Pet. App. 14a-15a. The court observed that its decision did not rest on any of the materials produced at the *in camera* proceeding, and consequently any error that may have infected that proceeding was harmless. Pet. App. 15a. Petitioners do not pursue those issues in this Court.

1. The military and state secrets privilege protects the Nation's vital interest in preserving military and diplomatic secrets. The existence of the privilege is well established. See *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953); *Totten* v. *United States*, 92 U.S. 105, 107 (1876); *United States* v. *Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.) ("That there may be matter, the production of which the court would not require, is certain."). In *Reynolds*, the Court set out "the principles which control the application of the privilege." 345 U.S. at 7. The privilege belongs to the United States; it cannot be asserted or waived by a private party. The privilege must be formally asserted by the head of the department with control over the protected information after personal consideration by that officer. Ultimately, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," but it must do so "without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8.

The Court noted in *Reynolds* that "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted." 345 U.S. at 11. The Court concluded, however, that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Ibid.* The Court observed that in *Totten* v. *United States*, *supra*, the action was dismissed on the pleadings because "the very subject matter of the action * * * was a matter of state secret" and consequently it was "obvious that the action should never prevail over the privilege." 345 U.S. at 11 n.26. See also *Ellsberg* v. *Mitchell*, 709

F.2d 51, 57 (D.C. Cir. 1983) ("When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege."), cert. denied, 465 U.S. 1038 (1984). Accord *Zuckerbraun*, 935 F.2d at 946-947; *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984); *Halkin* v. *Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (*Halkin II*).[4]

2. The Secretary of the Navy properly invoked the military and state secrets privilege in this case.[5] There can be no serious dispute that classified information concerning the design, performance, and characteristics of the *Stark* is protected by the military and state secrets privilege. As Secretary Garrett's declaration explains, the *Stark* is the most advanced frigate in the United States Navy. The *Stark* and its sister ships form the largest class of

[4] Petitioners contend (Pet. 16-19) that dismissal of their claims violated their constitutional right of access to the courts. But this Court has never understood that right as conferring on plaintiffs in civil actions an absolute entitlement to proceed to trial despite a serious risk that trial would compromise vital military or state secrets. *Reynolds* and *Totten* are inconsistent with petitioners' extravagant conception of the right of access to the courts.

[5] The Secretary's declaration "provide[d] a lengthy and detailed description of the subject matter of the classified information, * * * and explain[ed] that use of this information in litigation would be inimical to the national security." *Zuckerbraun*, 935 F.2d at 547. Although petitioners nevertheless assert (Pet. 12) that the Secretary made "bare assertions" of the privilege in a "conclusory" affidavit, they "cannot seriously contest the fact that the privilege was properly invoked," 935 F.2d at 547.

surface combat ships in the Navy, and "are expected to be the United States' primary class of frigates well into the 21st century." Declaration of H. Lawrence Garrett, III, reprinted in *Zuckerbraun*, 935 F.2d at 548.

The *Stark*'s rules of engagement also are subject to the military secrets privilege. The rules of engagement determine the circumstances in which U.S. forces may employ weapons and defensive systems, and the extent to which they may employ them. As the Second Circuit concluded in *Zuckerbraun*, "it is self-evident that disclosure of secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation's warships may reasonably be viewed as inimical to national security." 935 F.2d at 547.

3. Petitioners assert (Pet. 8-9, 18-19) that the court of appeals' decision conflicts with decisions of other courts of appeals adopting procedures short of dismissal to protect military and state secrets. There is no such conflict. As the court of appeals recognized (Pet. App. 5a-6a), the state secrets privilege does not require dismissal if the litigation can proceed without jeopardizing the privileged information. But it is well established that dismissal is necessary if it is clear that a plaintiff cannot prove his claims without threatening to divulge the protected material. In *Totten*, for example, dismissal was required where an intelligence agent sought to recover under an alleged contract with President Lincoln. The Court ruled that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confiden-

tial, and respecting which it will not allow the confidence to be violated." 92 U.S. at 107. Because litigation of the agent's claim could have resulted in disclosure of privileged military information "to the serious detriment of the public," *id.* at 106-107, the Court affirmed the order of dismissal.

The Fourth Circuit applied that principle in a tort suit between private litigants in *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (1980) (en banc). The court ruled that dismissal was required at the outset of the litigation because "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation." In *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236 (1985), the Fourth Circuit again affirmed a dismissal in a suit between private parties because "the nature of proof to be presented" posed "a substantial threat that state secrets will be compromised." *Id.* at 1243. The court noted that dismissal would not be ordered lightly, but recognized that dismissal was required "where, as here, the very question upon which the case turns is itself a state secret." *Id.* at 1239 n.3. See also *Halkin II*, 690 F.2d at 998-999 (affirming dismissal of suit because, without privileged information proving whether plaintiffs' communications were intercepted by government, plaintiffs could not establish standing).

In sum, every court to consider the issue has concluded that dismissal is required where litigation

cannot proceed without significant risk that state secrets will be compromised.[6]

4. Petitioners incorrectly assert (Pet. 12) that the lower courts' "uncritical acceptance" of the government's claim of privilege "represents a relinquishment of the judicial province." That is not so. The court of appeals carefully evaluated the government's claim of privilege and concluded that petitioners could not establish a prima facie case without access to classified information of central importance to the national security. See Pet. App. 8a-9a. As the Second Circuit recognized in *Zuckerbraun*, trial of petitioners' case would require

> access to data regarding the design, manufacture, performance, functional characteristics, and testing of [weapons and defensive] systems and the rules of engagement under which the Stark was operating. This data is in its entirety classified

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[6] In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), the Court had no occasion to consider the military and state secrets privilege. Consequently, petitioners' reliance (Pet. 18) on that case is misplaced. Further, *Boyle* itself illustrates the principle established in *Reynolds* that remedies available to private parties must be limited when necessary to accommodate certain overriding federal interests.

Petitioners assert, somewhat inconsistently, that the United States "has selectively chosen to use the privilege as an offensive weapon," and that the "Government now seeks dismissal in every case in which state secrets may be implicated." Pet. 16. Neither assertion is correct. The Government always seeks to protect state secrets, but the decision to seek dismissal is made on a case-by-case basis and turns on the government's evaluation of whether dismissal is required to ensure adequate protection of the state secrets at issue.

> and subject to the claim of privilege. The very subject matter of this action is thus a state secret.

935 F.2d at 547-548. In this case, the court of appeals agreed with the Second Circuit's reasoning and emphasized that "[s]uch an analysis of the capabilities of an advanced Navy frigate's defensive systems is the type of judicial disclosure of state secrets the doctrine blocks." Pet. App. 9a.

The court of appeals correctly concluded that the assertedly unclassified evidence offered by petitioners did not establish a prima facie case of negligence or causation. To establish their affirmative case at trial, petitioners would be required to demonstrate not only the capabilities of the Phalanx System, but also the alleged defects in the system and the rules governing the employment of the Phalanx and other weapons systems. All of that information is classified. In addition, as the Fourth Circuit recognized in *Farnsworth*, litigants at trial "have every incentive to probe as close to the core secrets as the trial judge would permit." 635 F.2d at 281. "In these circumstances, state secrets could be compromised even without direct disclosure by a witness." Pet. App. 11a, quoting *Fitzgerald*, 776 F.2d at 1243. Indeed, even the government's assertion of objections to specific evidence could undermine the privilege. Pet. App. 11a-12a, citing *Fitzgerald*, 776 F.2d at 1243 n.10.[7]

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[7] To be sure, "[c]ourts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (*Halkin I*), quoting *United States* v. *Nixon*, 418 U.S.

5. Petitioners urge that the courts below failed to give full consideration to means of protecting state secrets short of dismissal. On the contrary, the court of appeals expressly considered other means of protecting the privilege and concluded that "[n]o intermediate solution such as those proposed by plaintiffs, as ably and creatively as their counsel has put it, can fully protect the United States' interest in keeping its state secrets undisclosed." Pet. App. 14a. Similarly, the district court concluded that petitioners' "suggestions are unworkable when the case, such as the instant one, encompasses so much classified information." Pet. App. 29a-30a.

In *Reynolds*, the Court observed that even *in camera* scrutiny by the court should be avoided if the court can determine, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." 345 U.S. at 10. As the District of Columbia Circuit stated in *Ellsberg* v. *Mitchell*, in rejecting the contention that plaintiff's counsel should have been permitted to participate in *in camera* proceedings:

> It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.

683, 710 (1974). Petitioners confuse appropriate judicial deference with the abdication of judicial responsibility.

709 F.2d at 57 n.31, quoting *Clift* v. *United States*, 597 F.2d 826, 829 (2d Cir. 1979) (rejecting contention that district court should have permitted *in camera* discovery with respect to documents subject to the state secrets privilege), quoting *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1369 (4th Cir.), certs. denied, 421 U.S. 908 and 421 U.S. 992 (1975).

The courts have likewise recognized that the security of state secrets cannot be adequately guarded by protective orders. As the court emphasized in *Ellsberg* v. *Mitchell*, 709 F.2d at 61, "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." Accord *Halkin I*, 598 F.2d at 7 ("[p]rotective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result"). See also *Colby* v. *Halperin*, 656 F.2d 70, 73 (4th Cir. 1981) (reversing order that would have permitted an expert witness to divulge certain information to his lawyer on the condition that the lawyer was required to obtain a security clearance).[8]

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[8] The cases cited by petitioners (Pet. 18) are readily distinguishable. In *Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977), the court did not consider the scope of the state secrets privilege. In that case, the United States participated as amicus curiae to endorse the district court's decision to strike a demand for a jury trial in a contract suit between two contractors on a classified defense project. In *Northrop*, 751 F.2d at 399-408, the court upheld the state secrets privilege asserted by the Department of Defense but rejected a separate contention by the State Department that a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

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subpoena was overly burdensome. In *Halpern* v. *United States*, 258 F.2d 36 (2d Cir. 1958), the court ordered an *in camera* trial in a patent suit. The court distinguished *Reynolds* and *Totten* on the ground that the patent suit arose under "a specific enabling statute contemplating the trial of actions that by their very nature concern security information," and that the plaintiff would not need to acquire information not already in his possession. 258 F.2d at 44.

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No. 92-1209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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QUESTION PRESENTED

Whether the dismissal of a civil action on the pleadings, based on nothing more than the intervenor Government's bare assertion of the state secrets privilege, violated the petitioners' constitutional rights of access to the courts.

PARTIES TO THE PROCEEDINGS

The petitioners' are the legal representatives of sailors killed and injured on board the U.S.S. STARK on May 17, 1987. Their names are as follows:

Lawrence M. Bareford (injured)
Mr. and Mrs. Roland Bolduc (Doran H. Bolduc, deceased)
Mr. and Mrs. Leonard Calkins (Jeffrey L. Calkins, deceased)
Mr. and Mrs. Robert A. Caouette (Mark Robert Caouette, deceased)
Mrs. Kathleen Ciletta (John A. Ciletta, Jr., deceased)
Mr. and Mrs. Robert DeAngelis (Christopher DeAngelis, deceased)
Mr. and Mrs. Rodney Erwin (Steven Thomas Erwin, deceased)
Mrs. Shirley Jean Farr
Kasandra Ann Farr, a minor
Mr. and Mrs. Wilson P. Farr (Jerry Boyd Farr, deceased)
Mrs. Ernestine Foster
Tyrone Foster, a minor
Vernon Foster, a minor
Leo Foster, Sr.
Mim Foster Gaines (Vernon Foster, deceased)
Karen Gangidine (Martin Supple, deceased)
Mr. and Mrs. Nathan Grissette, Jr. (Dexter D. Grissette, deceased)
Mrs. Frances Homicki
Laura T. Homicki (Daniel Homicki, deceased)
Mr. and Mrs. Kenneth D. Janusik (Kenneth D. Janusik, deceased)
Mrs. Diane P. MacMullen

Deborah A. MacMullen, a minor
Lauren E. MacMullen, a minor (Thomas J. MacMullen, deceased)
Mr. and Mrs. Walter S. Phelps, III (Jeffrey Lee Phelps, deceased)
Mrs. Diana Lynn Pierce
Randi Lynn Pierce, a minor
Logan Mitchell Pierce, a minor
Mr. Donald W. Pierce (Randy E. Pierce, deceased)
Robert Quick
Karen Jean Welch (Kelly R. Quick, deceased)
Mrs. Carol A. Shippee
Patricia C. Shippee, a minor
Timothy M. Shippee, a minor
Brian R. Shippee, a minor (Robert L. Shippee, deceased)
Mr. and Mrs. Roger Stephens (Lee Stephens, deceased)
Mr. and Mrs. Bobby G. Stevens (James R. Stevens, deceased)
Mr. and Mrs. Alfred Ulmer (Vincent L. Ulmer, deceased)
Mrs. Lori E. Weaver
Patty J. Strong (Wayne R. Weaver, II, deceased)
James R. Wheeler (injured)
Mr. Joseph E. Wilson
Mrs. Mamie E. Wilson (Lloyd A. Wilson, deceased)

The respondents are private corporations:

General Dynamics Corporation
Hughes Aircraft Company
Unisys Corporation
General Electric Co. d/b/a RCA Corporation

RCA Government Systems Division
General Electric Aerospace
Advanced Technologies, Inc.
Rockwell International Corporation
FMC Corporation
Cardion Electronics, Inc.
Raytheon Company

At trial, the United States Government, through the Department of Justice, intervened in this case and is also a respondent in this proceeding.

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OCTOBER TERM, 1992

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v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

PETITIONERS' REPLY MEMORANDUM

This memorandum is filed in reply to the opposition brief filed by the contractor respondents.

1. This Court Should Resolve the Real and Intolerable Conflict Among Circuit Courts in the Substantive Treatment of State Secrets Assertions by the Executive.

The defense contractors, in their opposition brief, have suggested that there is no real conflict at all among

circuit courts on the substantive treatment of the state secrets privilege. Indeed, they find "remarkable consistency" -- almost as if there *were* standards to guide district courts in the application of the privilege. The contractors shrug off the circuits' inconsistent treatments of the privilege as an "illusion" created by "widely different factual and procedural circumstances." *See* Brief in Opposition at 2. Like some Orwellian credo, they seem to say that lack of uniformity *is* uniformity.

The conflict presented here is real. There are no standards to guide the lower courts in their treatment of this privilege. The conflict can perhaps best be observed by an example.

Consider that one is a district judge. A product liability suit is filed against private manufacturers. Before anything other than the pleadings has been filed, the United States Government intervenes. The Government moves to dismiss the suit in its entirety based on nothing more than generalized assertions, by a department head, that the case threatens national security.

Confronted with this typical scenario, what then are the substantive precedents that guide the district judge in his or her treatment of the state secrets privilege? Well, the district judge could stay the proceedings until the national security threat no longer exists. *Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1979). The district judge could order an *in camera* trial. *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958). The district judge could deny a jury trial and appoint a special master to establish safeguards. *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132-33

(2d Cir. 1977). The district judge could deny the motion to dismiss and order the Government to make item-by-item objections to discovery. *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989), *cert. dism'd sub nom. United States v. Albertson*, 493 U.S. 960 (1989); *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 394 (S.D.N.Y. 1982); *United States v. Felt*, 502 F. Supp. 74, 76 (D.D.C. 1980). The district judge could order the Government to submit to depositions in a secure facility or to answer limited interrogatories. *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991); *Jabara v. Kelley*, 75 F.R.D. 475, 489 (E.D. Mich. 1977). The district judge could consider the privileged information removed from the case and allow the plaintiffs to proceed without the information. *United States v. Reynolds*, 345 U.S. 1, 11-12 (1953); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984); *N.S.N. Int'l Industry v. E.I. DuPont de Nemours & Co.*, 140 F.R.D. 275, 281 (S.D.N.Y. 1991). The district judge could require the plaintiffs to present a *prima facie* case on nonprivileged information against the manufacturers. *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984). Or, as here, even if the plaintiffs had presented a *prima facie* case, the district judge could dismiss the suit without further scrutiny.

In short, there are *no standards* which guide the lower courts and litigants in the proper substantive treatment of the executive's assertion of the state secrets privilege. The lower courts' treatment of the privilege has become a free-for-all, in which any option is available on any set of facts in any circumstance.

In an effort to manufacture some uniformity among these contrary holdings, the contractors first urge that the

courts agree on the manner in which the state secrets privilege should be invoked by the executive. *See* Brief in Opposition at 3-5. The petitioners have never raised that issue. Rather, the issue presented here is how the courts are to treat the privilege, consistent with constitutional rights, once the privilege has been invoked.

The contractors next urge that there is no conflict among circuits that dismissal is "necessary" where a plaintiff cannot make out a *prima facie* case without privileged evidence. *See* Brief in Opposition at 7-9. Such a proposition ignores those cases (including *Reynolds*) which do not require a *prima facie* threshold. *See, e.g.*, *Clift*, 597 F.2d at 830; *Loral Corp.*, 558 F.2d at 1132-33; *Halpern*, 258 F.2d at 43-44; *Spock v. United States*, 464 F. Supp. 510, 519-20 (S.D.N.Y. 1978).

Such a proposition also ignores the fact that "*prima facie* evidence" itself is an amorphous standard. "*Prima facie* evidence" can mean whatever the lower courts choose for it to mean.

For example, in the present case, the Fifth Circuit adopted a summary judgment standard of review. *See* Pet. App. 7a. However, in contrast to this Court's teachings, summary judgment was granted before *any* discovery was conducted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 318 (1986) (Rehnquist, J.) (plaintiff is not to be "railroaded" by premature summary judgment before discovery is complete). And, the defendants were not required to present any evidence (other than the conclusory affidavit) in support of summary judgment. *Id.* at 328 (White, J., concurring) (conclusory assertions are insufficient, regardless of how the movant responded).

Nonetheless, the petitioners produced below an enormous body of evidence, all of which was unrefuted by the respondents and all of which was in the public domain.

Appended to this reply brief are just two of the affidavits presented below. In a remarkable contradiction (and in an effort to assist General Dynamics in a separate *qui tam* suit in California in which the Government did not intervene), the Government judicially admitted that these affidavits "do not contain classified information." (R.E. 43).

These affidavits, by former General Dynamics' employees, provide sworn evidence of every element of the petitioners' causes of action for fraud, products defects, negligence, and deceptive trade practices. *See* Reply App. 1a-25a.[1] In addition, the petitioners provided affidavits from the commander of the STARK at the time of the attack, the Secretary of the Navy at the time of the attack, the lengthy and unclassified reports by Congress on the incident, and a host of other evidence -- all uncontroverted.

There is perhaps no better way for this Court to determine how chaotic the case law in this area has become than to read these nonclassified affidavits. It is submitted that if these uncontroverted affidavits alone do not present fact issues which preclude summary judgment, or do not present a *prima facie* case, then no proof could ever survive dismissal in a state secrets case. *Compare Ellsberg v. Mitchell*, 709 F.2d at 65-66 (*prima facie* evidence met by defendant's admission that wiretaps were pursued without a

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[1] For economy of presentation, the exhibits attached to the affidavits have not been reproduced here, although they are referenced in the affidavits and are part of the record below.

warrant even though factual record not developed by discovery); *In re United States*, 872 F.2d at 478 (*prima facie* evidence met by substantial information obtained under the Freedom of Information Act). Since there are no substantive standards to guide the district courts, the quantum of proof necessary to survive dismissal is unknown.[2]

Not only is the conflict presented here real and substantive, but it is also intolerable. The longer this Court waits to resolve these substantive conflicts, the greater the potential for abuses done in the name of national security. If this precedent is allowed to stand unchecked, the Government need merely assert a "threat" to national security to procure dismissal of any civil case. Such an invasion of the judicial prerogative should no longer be permitted.

2. This Court Should Restore a Constitutional Balance.

Finally, and perhaps most importantly, the contractors have chosen not to address the central issue raised by this petition -- that is, the proper compromise that should be struck between the constitutional right to protect state secrets and the constitutional right of access to the courts. *See United States v. Reynolds*, 345 U.S. at 9 (courts should apply a "formula of compromise" with the state secrets privilege).

The contractors refer to the constitutional concerns identified in *Reynolds*, and properly raised here, as a "red

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[2] The respondents refer to *Zuckerbraun* as being "on all fours" with this case. *See Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). However, in *Zuckerbraun*, the plaintiff presented *no* proof after the state secrets privilege was invoked. *Id.* at 548.

herring." *See* Brief in Opposition at 7. The contractors want this Court to hold that the bare assertion of the state secrets privilege by the executive, without further judicial scrutiny, is sufficient to warrant dismissal of a litigant's case. However, such a result was specifically rejected with the privilege against self-incrimination, and should be rejected here. *Reynolds*, 345 U.S. at 8. Instead, this Court should establish standards which ensure a compromise between the competing constitutional concerns. *Id.* at 8-9.

As the experience of the lower courts demonstrates, this Court's resolution of these issues is long overdue. This petition presents this Court with the unique opportunity to reconcile the conflicts below and to establish specific standards for the treatment of the common law state secrets privilege, consistent with the rights guaranteed under the Constitution.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 22, 1993 * Counsel of Record

DECLARATION OF DAVID VILLANUEVA

I, DAVID VILLANUEVA, declare and state as follows:

1. That I am over 18 years of age, and reside in Riverside, California. I currently own and operate my own business, located at 11130 Magnolia Avenue, Suite A, Riverside, California 92505.

2. I am a former employee of General Dynamics Corporation, Pomona Division, where I worked from January 1, 1980 until approximately September 11, 1987. The Pomona Division, during that time, was the prime contractor for the Phalanx gun system, under contract with the United States Navy.

3. In August of 1976, I joined the United States Navy and was in active duty, and attended Consolidated Naval Electronic Warfare School in Pensacola, Florida. Subsequently, I went out to Pearl Harbor in March of 1978, as an "Electronic Warfare Specialist". During my career with the Navy, I collected intelligence, analyzed subsurface, surface, and airborne activities; recommended tactical response to threat scenarios; maintained, calibrated and repaired analogue, digital, RF, microwave, and signal processing equipment; such as receivers, jammers, blankers, antenna systems, control systems, radar systems, and test systems; analyzed soviet and enemy strategies; weapon profiles,; and theater assessments.

4. I was in the Navy until October of 1979, and began working at General Dynamics on January 1, 1980.

5. I first began work on the Phalanx program in August of 1981, where because of my technical background and capability, I was assigned to conduct fault isolation and failure analysis on Phalanx circuit cards, analyzing failures that had occurred both in the forward build production process, as well as in the field. In order to properly diagnose these failures, which General Dynamics did not previously have the capacity to do, I began creating software programs that would exercise the circuitry and correctly reflect functional results. I discovered widespread, consistent failures for virtually all circuit cards and their associated functions within Phalanx systems produced by General Dynamics.

6. The Phalanx Close-In Weapon System (CIWS) was designed to be the United States Navy's last line of defense against airborne threats to the fleet, and in particular, low-flying missiles. The Phalanx functions on a radar subsystem that includes both search and track radar. The radars provide data to a fire control computer, which processes targetting information and directs gunnery. Upon location and identification of a target that matches the Phalanx program criteria of an inbound threat, the search radar "hands over" to track radar. Phalanx is designed for extremely short reaction time for search to track handover, and gun settling, and is also designed to maximize accuracy upon firing by eliminating intra-system alignment errors caused by movement of the ship.

7. The Phalanx acquires its target, and automatically tracks, fires, registers target destruction, assesses new threats and engages them sequentially.

8. The Phalanx fires its M6-1A1 gattling gun, which has six barrels and has electrically driven train and

elevation controls, and uses closed-loop spotting by measuring both its target and bullet location, updating the fire control solution to reduce difference to zero, thereby aligning the bullets with the targets. In this manner, the Phalanx is designed to automatically and continuously direct a stream of bullets onto the target throughout a firing, at 3,000 rounds per minute. This informaiton is documented on a 1987 Phalanx brochure put out by General Dynamics. This brochure is attached to this declaration, and incorporated herein as Exhibit A.

9. The circuit cards that make up the Phalanx are organized in drawers, and particular drawers are associated with particular functions. The broad functions of the different drawers includes search processing, track processing, target detection, self-testing systems, radio frequency (RF) processing, intermediate frequency (IF) processing, and another that deals with power supply functions. The vast majority of my work at General Dynamics related to these "drawers" and the circuit cards within.

10. I was, and continue to be, intimately familiar with the functional design and electronic circuitry incorporated in this system, and the way the phalanx conducts signal processing from radar returns. I am knowledgeable regarding the technical methods, processes and designs associated with how Phalanx checks itself with digital wrap-around tests, checking its capacity to accurately compute elevation, and azimuth. I am familiar with the specific information that was classified as (sic) the time I was with General Dynamics, as I had full clearance and access to this information.

11. In 1982, when we were just beginning to deliver the first completed systems to the United States Navy, I was tasked to conduct fault isolation and analyze failures of Phalanx circuit cards. I immediately became aware the GD test software programs used to test Phalanx circuit cards were defective, and hardware deficiencies remained undetected in production.

12. I further discovered that the software programs were certified by General Dynamics to meet Navy specifications, and that management knew it could not possibly meet specifications. In October of 1985, I became Senior Engineer, which provided me with greater access to all Phalanx software test programs, and authority to investigate deficiencies.

13. One major example of my findings is documented in a briefing that I directed to management in 1985, entitled "Blanket Software Changes." This document is attached and incorporated by reference as Exhibit B. The computerized test equipment designated TE-8009 is one piece of equipment that was used to test 120 out of the approximate 300 circuit cards that make up a completed Phalanx system. As I documented in my report, "The existing tests suffer from what is commonly referred to as 'spaghetti programming'". In this report, I described detailed findings that demonstrated test software used on TE-8009 did not and could not perform tests in a manner which was even remotely accurate. As I warned management in my "Conclusion", "the effects of impetuously constructed software can prove enduring and proliferative."

14. I prepared this report for the following managers: Delano Alli, my Group Engineer; Rick Riley, the Chief of Engineering for Phalanx Production; and Ed

Roebuck, the Manager of Engineering for Phalanx Production. I prepared this report to intentionally begin documenting clear evidence that the test software written and employed by General Dynamics to test circuitry for production Phalanx systems, was defective and could not possibly produce accurate results, and in many cases was unable to produce a result at all. I had verbally reported these facts to Delano Alli and Rick Riley since beginning work on Phalanx test software in 1981. With the exception of allowing me to continue in my efforts, which I pursued upon my own motivation and volition, no corrective action was devised, authorized, or taken by General Dynamics management.

15. To better understand how Certified Test Operators (CTOs) managed to achieve "pass" results in order to move this circuitry forward, and assemble the cards into completed Phalanx systems that were delivered to the Navy, I personally interviewed one hundred per cent (100%) of the test operators working on the program between 1985 and 1986.

16. I learned that on a daily basis, CTOs consistently employed various techniques and methods of "test cheating" in order to obtain "pass" results at "lower level tests" (circuit card testing).

17. I further learned that performance ratings given by management to the CTOs, were based on production yields in order to force these workers to employ illegal methods of test cheating and obtain "pass" results. Because of the condition of both Phalanx hardware, and Phalanx test software, the only way General Dynamics could manufacture and deliver completed Phalanx systems was to falsify the results of circuit card testing.

18. By 1985, the Pomona Division had received large amounts of failed circuit cards from systems deployed upon Navy ships. The falsification of required tests resulted in higher production rates, and General Dynamics was well on its way to satisfying the Navy's requirement for several hundred Phalanx systems. As many systems were not deployed upon Navy ships, the Pomona Division received increasing numbers of reports regarding the system's inability to remain operational once activated. I believe that on an average, Phalanx systems were able to stay "up" (turned on and in an operational mode) for six to twelve hours before breaking down due to circuit card failures. We learned from our own General Dynamics technical representatives, who conducted field trips to evaluate problems with Phalanx systems deployed on Navy ships, that they could not understand how the Phalanx systems could have made it through tests at General Dynamics, based on blatant and even visual defects they found while analyzing field failures on ships.

19. These types of reports became all too frequent, and continued through the entire course of my employment at General Dynamics. An example of one such report is attached to this declaration and incorporated by reference as Exhibit C. This report is a March 27, 1987, memorandum from Gregory Shelton, a GD technical representative who was evaluating problems with the Phalanx system on board the USS Roosevelt. He questioned how "Mount 22 was delivered to the Fleet with six miswires in the LCP front panel." He stated, "The issues here are obvious. The board was mis-wired, mis-inspected, incorrectly tested, and was not diagnosable in the field. I do not understand how this problem was not caught at TE-8000 [Final Acceptance Test] or earlier." This report is directed to the Senior Executive Management of General Dynamics Pomona Division.

20. Also incorporated in Exhibit C is another example of field reports that we regularly received at the Pomona Division was documented by C. J. Delarge regarding his findings when providing special training and technical assistance to resolve problems with the Phalanx System deployed upon the USS Harlan County, dated February 19, 1987. In this report, Delarge describes how seven new replacement circuit cards failed, after replacing cards that initially failed. He describes a typical Phalanx System's inability to remain operational for any amount of time without experiencing critical circuit card failures.

21. General Dynamics, upon delivering completed Phalanx Systems to the Navy, certified that Phalanx had passed the Government required thirty-hour operational "Final Acceptance Test." General Dynamics knowingly concealed that test cheating methods were employed at this system level as well. Not one single Phalanx system produced by General Dynamics in 1981 through at least 1987 could have legitimately passed this test. The United States Navy heavily relied upon this final test, and GD's misrepresentations, because this test would comprehensively demonstrate Phalanx reliability in performing its functions, during 30 hours of failure-free operation.

22. In fact, Phalanx systems consistently broke down when subjected to final acceptance testing, but computer records of these failures were erased through the use of another outlaw software program known as "PUDD", which stood for "Purge Dot D" ["D" is the computer's record of test data]. Further, secret repairs and rework were conducted on Phalanx Systems undergoing Final Acceptance Test, to keep the system operational. Technicians identified circuit cards or portions of circuits that were failing, and employed methods to bypass, massage, and tweak failing

circuitry to whatever degree necessary, while the thirty-hour clock was ticking. As a result, the Navy was delivered (1) Phalanx Systems that were defective, and subject to certain failures after being turned on, and (2) thirty-hour Final Acceptance Test data that was falsified.

23. General Dynamic's certifications that accompanied each and every Phalanx System delivered to the United States Navy, representing that the Phalanx Systems met Navy specifications, were simply and completely false. Final Acceptance Test falsification was well known within the General Dynamics Plant at Pomona. Management sent clear messages often and in many ways, to the work force, that the Navy must never find out about test falsifications and that jobs were at stake. This was the reason that I attempted to resolve the problem internally. It was during this period of time, between approximately 1984 and 1986, that the Phalanx destined for the USS Stark was manufactured. That system was subjected to false testing at both lower level and final acceptance tests.

24. Throughout 1985 and 1986, I directly confronted Phalanx program management, and warned them that an entire, program-wide redevelopment of production test software was needed. I further informed management that we were not testing Phalanx systems to Navy specifications, and that we were incapable of doing so because the test software was completely defective. The managers I confronted, met with, and sent documentation to, included Delano Alli, Group Engineer; Rick Riley, Chief of Engineering; Ed Roebuck, Manager of Engineering; and ultimately Clark Bostick, the Director of Phalanx Production, in approximately the spring of 1986. Mr. Bostick reported to Vice-President of Production for the Plant, Chuck Blood, who reported directly to the General Manager, Sterling Star.

25. At all times, these General Dynamics managers, and General Dynamics management in general at the Pomona plant refused to take the required corrective action. Management defended the Phalanx system by citing circuit card test yields that were absolutely the function of test cheating methods that CTOs were forced to employ.

26. Based on the results of my meeting with Mr. Bostick, and my clear impression that no corrective action would be considered or taken, I decided to continue climbing the ladder to the highest levels of the company. I next attempted to set up a meeting with Chuck Blood, but instead arranged a more convenient meeting with Ron Auletti, a Vice-President. We met in the summer of 1986. He demonstrated that he was amazed at this information, and promised that he would take action to stop the widespread test falsification immediately, and get to the root of the software problems.

27. Along with General Dynamics employee Jason Madden, I presented detailed information to Auletti, thoroughly describing my findings with regard to defective test software, test falsification. I directly informed him that Phalanx Systems we were delivering to the Navy were completely untested, and General Dynamics could not legitimately represent that the systems met specifications. In fact, we also discussed the widespread evidence coming in from the field that the Phalanx Systems were extremely unreliable, and explained that this was directly due to the fact that required testing was simply not performed.

28. Immediately after this meeting, I was removed from my job responsibilities, and completely kept away from Phalanx-related hardware, software, and personnel. I was given such responsibilities as counting components in the

stock room, cleaning off tables and sweeping floors. I continued receiving my salary as a lead engineer.

29. After the Stark incident, and during the same week that General Dynamics delivered the 500 Phalanx Systems to the Navy, in the summer of 1987, I met with Gary Smith of NAVPRO. After describing the defective nature of the software, and associated test falsification that had been occurring for years, he asked if I would meet with Captain Major of the United States Navy, from Phalanx Program Management. Two days later, I met with Captain Major. This meeting was conducted off-site, and I met him at a gas station at approximately 3:30 p.m., during a work day. We met inside his station wagon. After I described the details and facts to Captain Major, he asked me what I thought he could do to stop this problem. I told him that the answer was pure and simple, that the only way was to shut down the plant until a comprehensive redesign and rewrite of Phalanx software, and evaluation of Phalanx hardware, was completed. Production would simply have to stop all together, or the Navy would continue to take delivery of Phalanx Systems with hidden latent defects, with General Dynamics misrepresenting that the Systems had been tested.

30. To further document evidence, I conducted a "veteran CTO survey" in 1987, which is attached to this declaration as Exhibit D, and incorporated by reference herein. Because CTOs were afraid of losing their jobs, I designed this survey to keep the individuals anonymous, while still documenting their admissions that they falsify Phalanx testing as a result of management pressure. I sent copies of this to General Dynamics Phalanx program management. The survey indicates how many CTOs agreed with certain statements and what percentage of all CTOs that number represented. For example, 43% of the CTOs agreed

that "Management pressures me into getting the hardware out any way I can." 52% admitted, "I believe management will retaliate against me if I make waves by refusing to run bad procedures [test programs]".

31. I received a negative response from management, and was basically told to "shut up and do your job". While I was working on software, I was unable to resolve even a fraction of the software discrepancy reports sent to me by test operators because management insisted that no problem existed.

32. In September of 1987, I went to work with Dyncorp, a local company in Southern California that was on contract to the Navy's Fleet Analysis Center (FLTAC) to analyze new Phalanx test software proposed by General Dynamics to the Navy for acceptance and use. Because of my familiarity with the Phalanx program and the Pomona plant, Dyncorp assigned me the task of working on that Naval contract, to analyze Phalanx software. Once again, I found and documented in great detail, that software programs written for Phalanx circuit card testing by the Pomona plant did not perform tests to specifications, and was completely defective. When GD learned that I was working on Phalanx software, Dyncorp was pressured to reassign me to other contracts. However, in July of 1988, I was asked to look at another software program from General Dynamics related to the Phalanx system. I later learned that Jason Madden had turned this program over to the Naval Plant Representative Office (NAVPRO) at the Pomona plant. NAVPRO had consulted with FLTAC, and since Dyncorp had the contract to evaluate GD software, Dyncorp was chosen to analyze this data cartridge software program for the Navy. Dyncorp directed me to conduct this analysis, because of my familiarity with GD's test software system.

33. I conducted my analysis, which was confirmed by engineers at FLTAC, as documented by the Navy. My analysis for Dyncorp, and the Naval confirmation of this analysis and the functions of this outlaw program, are attached to this declaration and incorporated by reference as Exhibit E.

34. This software program clearly had only one purpose: to break the security codes on the Phalanx program test equipment at General Dynamics, and allow operators or engineers to alter required test parameters at will. This allowed GD to generate "pass" results no matter what the condition and capacity of the Phalanx circuit cards. The program left no trace of its use. In fact, in many cases, this program would generate a "pass" result without testing a card at all. General Dynamics did not refute this software analysis.

35. For reasons unknown to me, and beyond my logical comprehension, the Navy allowed General Dynamics to conduct its own investigation and report how this program had been used, to what extent, and for how long. It was no surprise when the company reported back to the Navy that the program had only been found on only four test consoles, and had probably been used a few times. GD did admit that the program was found on the TE-8009 console.

36. In my years of experience at General Dynamics analyzing and attempting to rewrite hundreds of completely discrepant test programs, it is my absolute belief that this "security busting" outlaw software program was used daily, and responsible for thousands of falsified tests throughout Phalanx productions from approximately 1983 through July of 1987.

37. The fact that the Phalanx Systems were extremely unreliable and certain to fail if relied upon by the Navy to fulfill their intended mission, was well known throughout management levels and the work force at General Dynamics in Pomona. Workers, including myself, often discussed our hopes that the Phalanx would never be relied upon by the Navy during a critical military engagement, and fears that men on board Navy ships would die if their lives ever depended on these systems. After the USS Stark incident, I attempted to get the Navy to do something through my meetings with Gary Smith and Captain Major. The work force was almost bewildered, and overcome with a deep sense of loss and guilt. Management quickly focused on damage control. An example of the company's position regarding the Phalanx role in the Stark incident is attached to this declaration and incorporated herein as Exhibit F.

38. Even after 37 sailors died and others were maimed for life, when an unreliable Phalanx System on board the USS Stark was unable to even recognize a target within its sight, General Dynamics continued to conceal the truth, and keep from taking corrective action.

39. I am personally familiar with the functions and capabilities of the Phalanx that was on board the USS Stark. I am aware of certain parameters, and radar frequency information that is classified. I was required to, and did, hold a security clearance for access to this information. None of the information that was classified is relevant to the performance of the Phalanx System on the night of the accident.

40. The information that is classified would deal with the Phalanx's ability to continue tracking its target in a

hostile electromagnetic environment. This was not the scenario on the night of the attack.

41. I reviewed internal information from inquiries conducted by the company into the Stark incident. I further reviewed investigations conducted by the United States Navy that were publicly reported. The information consistently indicated that the Phalanx was in AAW manual at the time the Stark was attacked.

42. It was further reported that the Phalanx did not hand over from search to track radar. It never detected an inbound missile that is the very threat the Phalanx was designed to identify and destroy.

43. Failure of the Phalanx System to locate, hand over and track the inbound Exocet missiles on the night of the Iraqi attack in May of 1987 is a failure that is consistent with circuit card anomalies or defects that should have been detected at the Pomona Plant, but the tests were never done and the results were falsified. The fact that the system on board the Stark, prior to the incident, had been experiencing breakdowns and circuit card failures, is also consistent with well-known reliability problems of the Phalanx System, which result from falsified Government required testing at General Dynamics in Pomona.

44. The fact that on the night of the incident both Exocet Missiles impacted the USS Stark and that sailors died, was absolutely expected by management of General Dynamics Pomona Phalanx Program, should the Phalanx ever be relied upon to fulfill its intended mission.

I make this declaration of my own knowledge, and if called upon to testify to the same in a Court of Law, I am able and willing to do so.

I declare under penalty of perjury, pursuant to the Laws of the State of California, that the foregoing is true and correct.

Executed this 19 day of January 1991, at Riverside, California.

s/David Villanueva

DAVID VILLANUEVA

[EXHIBITS OMITTED]

DECLARATION OF JASON MADDEN

I, JASON MADDEN, declare and state as follows:

1. That I am over 18 years of age, and a citizen of the United States. I reside in Rancho Cucamonga, California. I am fully competent to testify, and have knowledge of all the facts stated herein.

2. I am a former employee of General Dynamics, Pomona Division, in Pomona, California, where I worked from March of 1979 until August of 1988.

3. Prior to working for General Dynamics, I developed experience and expertise as a technician and electrician, working on mechanical, electrical, and electronics equipment. I was hired into General Dynamics as an Industrial Electrician "A", and worked in that capacity from March of 1979 through March of 1985. During this period of time, I became familiar with the installation, maintenance, and repair of computer-controlled industrial equipment, computer labor equipment, and other high technology production equipment.

4. From March of 1985 until August of 1988, I was a calibration technician responsible for maintenance and repair of Department 71 Phalanx test equipment. I was responsible for preparing Government required Quality Assurance documentation related to equipment and test procedures, test fixtures, and test codes.

5. By approximately December of 1985, I had become familiar enough with Phalanx test equipment and Phalanx circuit cards undergoing tests, to comprehensively understand the relevant Navy requirements and specifications

that were incorporated into General Dynamics tests and procedures. This is when I became aware that the practices which I had previously thought were just "strange" were actually illegal methods that GD personnel were using to get Phalanx hardware to pass tests.

6. I was primarily responsible for the test equipment that conducted lower level testing (LLT) of circuit cards that made up the electronics of the Phalanx system. Among the particular test stations that I maintained, was the TE-8009, which tested approximately 120 of the approximate 300 Phalanx circuit card types, TE-8010 (noise), 8005 (radio frequency), 8008 (intermediate frequency), 8025 (radar), and TE-8019 (high voltage) and 8029 (high voltage sub-assembly).

7. After lower level testing and assembly, completed Phalanx systems were tested at TE-8000, which was the "Final Acceptance Test" for completed Phalanx Systems, and also required by the Navy.

8. I believe in approximately December of 1985, I witnessed Group Engineer Delano Alli standing at the TE-8009 one morning when I came in. Numbers were flashing across the CRT screen for this computerized test station, exhibiting some sort of program that I was not familiar with. I had seen this at times before, but I did not understand what the program was used for, or what it did, and I was surprised to see Mr. Alli accessing this program at this test station. A co-employee named Tom Foster was present, and he told me that Alli was working on the station. When Mr. Alli saw me, he quickly gathered some papers together, exited the program, and left.

9. About six months later, I finally asked GD Tech. Richard Lervolt what the program was for, when I saw him running it on a different station. This was when I first learned that engineers used this program to break security codes that existed on this test equipment. These security codes were required by the Navy, so that the test software loaded onto the test systems in order to test Phalanx hardware, could not be altered or changed in any way. I was aware that the test software had to be accepted and approved by the Navy. The Navy further required that the test stations be secured for assurance that Phalanx circuit cards were in fact being tested to required parameters.

10. This software program, after breaking the security codes, allowed engineers to alter parameters in order to get failing hardware to pass.

11. Throughout 1986, as I performed my responsibilities in maintaining and calibrating the test equipment, I became aware of just how frequently this program was used. It existed on literally every piece of test equipment that I serviced. I also discovered and regularly witnessed on a daily basis, certified test operators conducting a wide range of different methods to "cheat" testing any way they could during their shift.

12. These methods of "test cheating" that I observed primarily involved running tests over and over again on one circuit card under test, until they were able to achieve a "pass" result. If any history files were kept on the computer, they were erased. In some cases, stations did not maintain history files, so there was no record of the numerous failures that had occurred prior to a "pass" result.

13. Test operators were also aware of a trick that involved determining at which test parameter a particular card would fail. The operator would wait until the test the parameter just before the failing point, and then would "abort" the test. On some stations, the computerized equipment would produce a "pass" result, even though the test had been stopped short prior to a point of known failure.

14. As I became more experienced, it was obvious that test operators could not get Phalanx circuit cards to pass required testing, without cheating the cards through one way or the other. In my conversations with these "CTOs" (Certified Test Operators), I learned that their jobs, raises, bonuses, and employee reviews were based on their production yield -- how many circuit cards they passed through tests.

15. I learned that the "strange" program that I had seen used by Delano Alli and others, was primarily accessed by failure diagnosis engineers, when none of the test cheating methods used by CTOs would work.

16. When the engineers were presented with circuit cards that could not be made to pass, instead of analyzing what was wrong with the hardware, they used this "security-busting" program, to widen the parameters of the software.

17. Test falsification went on to such a degree, that it actually constituted the normal every-day life in the Phalanx circuit card test area.

18. It was well known that the test software was bad, and in some cases we knew that the hardware was bad, but in general, we did not know whether circuit cards under

tests that were failing were bad, good, or otherwise. We were simply not conducting any type of reasonable, required, or reliable testing at all. We were under great pressure from management to keep the production rate up. We were also expected to keep our mouths shut and put on a good show for the Naval plant representatives at the Pomona facility. Still, General Dynamics certified that we had performed all required tests, and that each Phalanx we delivered met Navy specifications.

19. I began to discuss test falsification at the time that I became aware of it. I first spoke with Larry Vaughn, a Supervisor of Quality Assurance Engineering in Department 27-A. He was fully aware of the regular occurrence of falsification on all different test stations, and the various methods that CTOs used. He was also aware of the security-busting program that engineers used when the CTOs failed.

20. I personally spoke with Vaughn's boss, John Stewart, the Chief of Quality Assurance Engineers. Through these conversations with Stewart, I learned that he was personally aware of these details.

21. During the beginning of 1986, I also spoke with Don Humphries, the Quality Assurance Manager, as well as another Chief Quality Assurance Engineer named Chuck Head. They were fully aware of these same facts, and GD's longstanding efforts to conceal this from the Navy.

22. I also had conversations with Danny Madison, the Superintendent of Phalanx production, who was well aware of the circuit card test falsification and details that I've described. As time went on, I learned that Madison, who

had a great deal of communication with upper level management, was a prime instigator of the test cheating.

23. Some time after the Stark incident, in approximately August of 1987, I set up a meeting with Rick Riley, the Chief of Engineering for Phalanx production. I also requested that my supervisor, Larry Vaughn, attend because I believed he would support and confirm the facts regarding massive test cheating of Phalanx circuit cards. I began reporting the history of the widespread cheating that I had observed, when Riley had an extremely sudden and hostile reaction. He told me that he did not want "to hear that kind of (explicative) (sic), and never to bring that kind of (explicative) (sic) to my office again." He ordered me to leave his office, and I left.

24. During later 1986 and early 1987, before the Stark incident, I used to have lunch in the Failure Diagnosis Room, and frequently spoke with the engineers about the Phalanx System. I used to sit in these groups, comprised of failure diagnosis team engineers, both during lunch and at coffee breaks. I had discussions about the system with other maintenance technicians from my own group as well. We talked about how the Phalanx could not possibly be a reliable system, and that we wouldn't ever want to have our lives to depend on it. Among the individuals that expressed these types of concerns and made these types of statements were Robert Tobin, Nasim Aziz, and Joe Puckett.

25. Delano Alli sometimes joined in these conversations, and we had arguments at times, because Alli skoffed (sic) at our concerns over the reliability of the Phalanx. During one argument, I directly accused him of not being concerned with the quality of the system. He stated "GD don't give a (explicative) (sic) about the Phalanx

working, and don't give a (explicative) (sic) about the Navy, all they give a (explicative) (sic) about is putting a dollar in their pocket and a dollar in the stockholder's pocket, and that's all they care about, so don't talk to me about quality."

26. The more I learned about the falsification of circuit card tests, the more I could not understand how General Dynamics was representing that the completed Phalanx systems were passing 30-hour Final Acceptance Tests at TE-8000. Just after the Stark incident, I spoke to my counterpart, Paul Maxfield, who was the Quality Assurance Calibration Technician for TE-8000. He told me about a program called "PUDD", which was used at Final Systems Test. "PUDD" stands for "Purge Dot D", and was used to purge the data file history of failures during the 30-hour operational tests. He told me that when the Phalanx fails, the operators and engineers go in and erase the failure, using "PUDD", and then tweak or change something in the Phalanx system to prevent the failure from appearing again.

27. I spoke with Larry Vaughn about "PUDD", and he admitted to knowing about this as well. He said that if anybody ever found out about that program, "It would shut this company down."

28. I also spoke to Terry Pickerel, a Quality Assurance Specialist Engineer in my Department, who was in charge of the people that fix the test station computers. He told me that the use of PUDD was leaving some tell-tale signs on the test print-out, and indicated that they hadn't "perfected PUDD" yet, because of that. From my conversations with these individuals during the summer of 1987, I became aware that "PUDD" had been used for quite some time, possibly throughout the history of Phalanx production. From these conversations, it was clear to me

that the program was used on a regular basis, during final acceptance testing of Phalanx Systems produced for the Navy by General Dynamics.

29. Both the lower level test cheating that I was intimately familiar with, and the use of "PUDD" at final acceptance test, were regular test falsification methods used by General Dynamics during the time that the Phalanx System destined for the USS Stark was manufac'ured and tested. There is no question in my mind that the circuit cards that make up that system, and the system itself at final acceptance test, were subjected to the types of falsified testing that I have described in order to deliver it to the Navy.

30. Because my conversations with General Dynamics supervisors and managers did not result in any corrective action being taken at the plant, I began regularly informing the Naval Plant Representatives about these blatant falsifications during 1986, 1987, and 1988.

31. The information I turned over to the NAVPRO resulted in three "Method C" level disciplinary actions taken by the Navy against the Pomona plant from 1986 to 1988. I have attached documentation regarding one particular "Method C" issued by the Navy on July 22, 1987, to the GD Pomona Plant shortly after the Phalanx incident. This document is attached hereto and incorporated herein by reference as Exhibit A.

32. I demonstrated to the Navy that CTOs were continuing to run multiple tests on a single card, until a pass result was obtained, without documenting or reporting failures as required by the Navy. I had further shown the Navy additional evidence that test results handwritten on

forms showed "passes", but the computer history files showed failing results. These and other methods of test falsification were confirmed by the Navy, and are referenced in this "Method C". This document clearly demonstrates that just after the Stark incident, General Dynamics continued to falsify Phalanx testing, and continued concealing these acts from the Navy.

33. As it was clear to me that the company had no intention to take corrective action with regard to Phalanx testing at every level, I decided to obtain a copy of the outlaw "security-busting" software program that had been in use at lower level test for years, and turn it over to the Navy. Upon obtaining the program, I turned it over to Evelyn Barry of the NAVPRO. I have attached a Department of the Navy Memorandum dated July 27, 1988, to this declaration, and it is incorporated herein by reference as Exhibit B. In this document, the Navy confirmed that "the tape contains a short program which lists all of the Master Security Codes in the test computer files. Anyone using this program would gain access to the test files security codes. Once these codes are compromised, the test file may be altered by the user at will. Use of this program or similar programs could provide users the ability to bypass the present configuration control procedures used to prevent tampering of the test programs."

34. The Navy then took further disciplinary action against the Pomona plant. However, the Navy did not investigate the extent to which this program was being used, although its only purpose to exist was clearly illegal.

35. Instead, for reasons unknown, the Navy relied on General Dynamics to investigate and report admissions of its own violations by developing and using this program.

36. I was terminated approximately one month after I turned this outlaw software program over to the Navy.

I make this declaration of my own knowledge, and if called upon to testify to the same in a Court of Law, I am able and willing to do so. I declare under penalty of perjury, pursuant to the Laws of the State of California, that the foregoing is true and correct. Executed this 19th day of Jan, 1991, at 12486 Morning Glory R. Cucamonga, California.

s/Jason Madden

JASON MADDEN

[EXHIBITS OMITTED]